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## STATEMENT OF THE CASE

### A. Factual Background

Texas's current congressional map is the natural result of four decades of Texas political history, during which the voting preferences of Texas voters have shifted decidedly. J.S., at 10a-13a.[1] The district court, which was familiar with the history of Texas politics and heard extensive testimony regarding its details in both 2001 and 2003, described Texas's recent political history as "the story of the dominance, decline, and eventual eclipse of the Democratic Party as the state's majority party." J.S., at 10a.

The district court noted that from Reconstruction until the early 1960s, the Democratic Party "dominated the political landscape in Texas." J.S., at 10a-11a. And, although Republican John Tower was elected to the United States Senate in 1961, Republican voting strength in Texas remained at approximately 35% throughout the 1960s and 1970s. J.S., at 11a. In the nine election cycles from 1962 through 1978, Republicans never won more than four congressional seats, while the Democrats never won fewer than twenty. J.S., at 11a, 42a. When William Clements, Jr., was elected Governor of Texas in 1978 – becoming the first Republican elected since 1874 – the Democrats that year still won twenty of the twenty-four congressional races and garnered 56% of the vote in statewide races. J.S., at 11a. The Republican Party steadily gained strength throughout the 1980s and, by 1990, approached the Democrats' level of support, gaining 47% of the statewide vote while the Democrats garnered 51%. J.S., at 11a. But congressional representation continued to lag behind statewide voting strength, with the Democrats winning 19 of the 27 seats in the 1990 election. J.S., at 11a.

In 1991, Texas was awarded three additional seats in the House of Representatives as a result of the 1990 decennial

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[1] Each of the jurisdictional statements included at least one of the district court's opinions in this case, and those opinions were not again reproduced in the Joint Appendix. For ease of reference, this brief will refer to the copies of the district court's opinions found in the jurisdictional statement filed by the Jackson Appellants, using the citation form "J.S., at ___a."

census. *See* J.S., at 42a. At that time, both Houses of the Texas Legislature were controlled by the Democratic Party, J.S., at 12a, 20a, as was the governorship of the State.[2] The congressional redistricting plan enacted later that same year – the design of which has been credited in large part to Appellant Congressman Martin Frost – was described by experienced and neutral observers as the "shrewdest" Democratic gerrymander of the 1990s. J.S., at 20a (citing MICHAEL BARONE, THE ALMANAC OF AMERICAN POLITICS 2002, at 1448); *see also* J.S., at 20a (quoting MICHAEL BARONE, THE ALMANAC OF AMERICAN POLITICS 2004, at 1510 ("The [Texas 1991 congressional redistricting] plan carefully constructs Democratic districts with incredibly convoluted lines and packs Republican suburban areas into just a few districts.")). Indeed, approval of Frost's plan came "despite the objections of some ethnic minorities that the plan favor[ed the] protection of incumbents over the creation of solidly minority districts." *Redistricting – State Update: TX*, THE HOTLINE, Aug. 21, 1991.

Following enactment of the 1991 plan, a number of Republicans challenged the plan as an unconstitutional partisan gerrymander, relying on *Davis v. Bandemer*, 478 U.S. 109 (1986). *See Terrazas v. Slagle*, 789 F.Supp. 828 (W.D. Tex. 1992) ("*Terrazas I*"). The district court denied the request for preliminary relief and permitted the 1992 elections to be conducted under the 1991 map. *Id.*, at 834-35. The 1991 gerrymander lived up to its billing. In 1992, the Democrats received a 49.9% plurality of the vote in the 30 congressional races – compared to the Republicans' 47% – yet the Democrats won a 21 to 9 majority in the Texas congressional delegation.[3]

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[2] Governors of Texas, Texas State Library & Archives Commission website, *available at* http://www.tsl.state.tx.us/ref/abouttx/governors.html.

[3] Election returns for the years 1992 to 2006 are publicly available on the website of the Texas Secretary of State. The web address of the elections database is http://elections.sos.state.tx.us/elchist.exe (last visited Jan. 31, 2006). When this brief cites to election returns that appear on this website, reference will be made back to this database as the "Election Returns Database."

Following the 1992 elections, the district court requested the *Terrazas* parties to file motions for summary judgment to dispose of the case. *See Terrazas v. Slagle*, 821 F.Supp. 1162, 1166 (W.D. Tex. 1993) ("*Terrazas II*"). Upon the state defendants' motion for summary judgment alleging the plaintiffs failed to set out a *prima facie* case under *Bandemer*, *id.*, at 1172 – and with the added benefit of having seen the plan's performance in the 1992 elections – the district court granted the motion with respect to the partisan gerrymandering claim. *Id.*, at 1175. The court read *Bandemer* to require the plaintiffs to show that they could not "over the long haul counteract [the congressional map] through [their] influence in another relevant political structure or structures." *Id.*, at 1174.

The court found the plaintiffs did not show that they could not influence the state political process because the Governor, who could veto redistricting legislation, was elected statewide and was not subject to the gerrymandered map. *Id.* Also, through winning enough seats in subsequent legislatures, the Republicans could influence congressional districting plans. *Id.*, at 1174 & n.16. The *Terrazas* court's admonition to the Republicans was simple: because they were not foreclosed from winning election to state offices that control congressional districting, they were not unable to influence congressional districting legislation. Therefore, the plan was upheld. *Id.*, at 1176.

The 1990s unfolded as the *Terrazas* court projected that they might. Although Democrats continued to win a majority of the seats in Texas's congressional delegation under the gerrymandered plan – despite ever growing majorities of votes cast for Republicans[4] – the Republicans

[4] From 1994 to 2002, Republicans earned a clear majority of the statewide vote, yet under the antimajoritarian districting plan their strength in Texas's congressional delegation lagged behind. *See* J.S., at 42a (district court's table depicts that the Republicans' steady increase in statewide strength did not result in comparable gains in the congressional delegation). In 1994, the Republicans held a 52% to 47% statewide advantage, but the Democrats won a 19 to 11 majority in the congressional delegation. *See* J.S., at 42a. In 1996, the Republicans' statewide advantage

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did begin to gain power in other "relevant political ... structures," *Terrazas II*, 821 F.Supp., at 1174. "[B]y 1990, the Republican Party had nearly achieved parity with the Democratic Party." J.S., at 11a. And in the mid-1990s the Republicans began to dominate statewide races. Indeed, the 1994 election cycle marked the last time a Democrat won a statewide election in Texas.[5] Since then, every election for one of Texas's 27 elective statewide offices[6] has been won by a Republican.[7] Nor has any Democrat been successful in any recent statewide bid to win a federal election – President or United States Senator – in Texas. Lloyd Bentsen, who won re-election to the United States Senate in 1988 was the last to do so.[8]

A similar shift occurred in the make-up of the Texas Legislature. During the 74th Legislature in 1995, Democrats controlled the Senate, 17 to 14, and the House, 87 to

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was 55% to 44%, but Texas's congressional delegation was 16 Democrats and 14 Republicans. *See* J.S., at 42a. In 1998, the Republican advantage increased to 56% to 44%, but it was the Democrats who gained an extra seat, leaving the delegation at 17 Democrats to 13 Republicans. *See* J.S., at 42a. In 2000, the Republicans had a statewide advantage of 59% to 40%, but the congressional delegation remained 17 to 13 in the Democrats' favor. *See* J.S., at 42a. And in 2002, the court-drawn redistricting plan yielded a 17 to 15 Democratic advantage, despite the Republicans' 57% to 41% statewide strength. *See* J.S., at 42a; *see also* Election Returns Database, *supra* note 3 (providing, for each year, statewide totals for votes cast for Congress – which also show strong Republican majorities).

[5] *See* Election Returns Database, *supra* note 3.

[6] The twenty-seven Texas officials elected in statewide elections are: nine Justices of the Supreme Court, *see* TEX. CONST. art. V, §2; nine Judges of the Court of Criminal Appeals, *see id.*, §4; Governor, Lieutenant Governor, Attorney General, Comptroller of Public Accounts, Commissioner of the General Land Office, *see id.*, at art. IV, §§1-2; three Railroad Commisioners, *see id*, at art. XVI, §30; and the Commissioner of Agriculture, TEX. AGRIC. CODE §11.004.

[7] The Republican candidate for governor in 2002 prevailed with 58 percent of the vote, *see* Election Returns Database, *supra* note 3, and the Republican candidate for governor in 1998 garnered 69 percent of the statewide vote, *id.*

[8] *Id.*; *see also* U.S. Senate, Senators from Texas, *available at* http://www.senate.gov/pagelayout/senators/one_item_and_teasers/texas.html.

63.[9] By 1997, Republicans took control of the Texas Senate and began to make gains in the Texas House of Representatives.[10] For the 78th Legislature in 2003, Republicans took control of the House, 88 to 62, and extended their majority in the Senate to 19 to 12.[11] By 2003, Republicans held all 27 statewide elected offices and held significant majorities in both Houses of the State Legislature.[12] But in the 2002 elections, Texas's congressional delegation remained 17 to 15 in favor of the Democrats.[13]

**The 2001 Court-Drawn Plan**

In 2001, the State was awarded two new congressional seats as a result of federal reapportionment of seats after the decennial census. J.S., at 206a. The Texas Legislature deadlocked on the question of how to draw congressional districts in its regular session.[14] After litigation in state court,[15] a federal district court undertook the task of

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[9] *See* Legislative Reference Library of Texas, 74th Legislature (1995)-Statistical Profile, *available at* http://www.lrl.state.tx.us/legis/profile74.html.

[10] *See* Legislative Reference Library of Texas, 75th Legislature (1997)-Statistical Profile, *available at* http://www.lrl.state.tx.us/legis/profile75.html.

[11] *See* Legislative Reference Library of Texas, 78th Legislature (2003)-Statistical Profile, *available at* http://www.lrl.state.tx.us/legis/profile78.html.

[12] *See* Election Returns Database, *supra* note 3.

[13] *See id.*

[14] In 2001, the Texas Legislature was still divided by party, with Democrats still controlling the Texas House of Representatives. Those legislators had been elected in 2000 using district lines based on 1990 census data from a time when Democrats controlled the process. *See* J.S., at 12a, 20a. After the legislative lines were adjusted in 2001 by the Legislative Redistricting Board – a statewide-elected body that has the power to redraw state-level districts but not congressional districts, *see* TEX. CONST. art. III, §28 – Republicans controlled both houses of the Texas Legislature in the 2002 elections. *See* Legislative Reference Library of Texas, 78th Legislature (2003)-Statistical Profile, *available at* http://www.lrl.state.tx.us/legis/profile78.html.

[15] The Texas Supreme Court rejected a plan that had been drawn by a lower state court because it had not been adopted as a final

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adding those two new seats to Texas's congressional map while readjusting the map to account for the new block-level census data regarding population. J.S., at 206a.

In that litigation, styled *Balderas v. State of Texas*, numerous plaintiffs vigorously contested the appropriate contours of the court-drawn map. J.S., at 202a-03a. Nevertheless, the three-judge panel "refused suggestions not required by law and rejected policy choices better left to legislative consideration." J.S., at 59a.[16] The court engaged in a neutral, low-impact line-drawing process, carefully eschewing changes that might have appealed to any individual judge's sense of political fairness – instead, the panel "wisely" left the decision to implement such changes "to the political arena." J.S., at 210a; *see also* J.S., at 21a.

The court began its new map by drawing the old majority-minority districts as they had been before. J.S., at 206a. Next, it added the two new districts allocated to Texas under the 2000 census numbers, placing "them where the population that produced the new additional districts [had] occurred," in Dallas and Harris Counties. J.S., at 206a. In drawing the remaining lines, the court "looked to general historic locations of districts in the state," with the natural consequence that most "districts fell to their long-held areas."[17] J.S., at 207a.[18]

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judgment of that court. *See Perry v. Del Rio*, 67 S.W.3d 85, 95 (Tex. 2001); J.S., at 204a.

[16] J.S., at 57a, 201a. Due to a rather unusual procedural history, the instant case is a direct continuation of the 2001 *Balderas* litigation. In challenging the 2003 redistricting, several plaintiffs returned to the *Balderas* court and argued that the new map violated the court's 2001 order. The *Balderas* case, in turn, was consolidated with several new lawsuits that were also filed challenging the 2003 map, and all the proceedings were tried together before the same three-judge court, consisting of Judge Higginbotham, Judge Ward, and Judge Rosenthal (the latter of whom replaced Judge Hannah from the original *Balderas* panel).

[17] Although the 1991 districting plan had been previously modified by a federal court, the resulting map left intact the bulk of the political choices made by the Legislature in drawing the 1991 map. In 2001, the

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Finally, the court carefully examined its map to ensure that its lines were not "avoidably detrimental" to the three most senior members of each major party's congressional delegation,[19] and to confirm that "no incumbent was paired with another incumbent or significantly harmed by the plan." J.S., at 208a.

The district court's neutral process, "while shorn of partisan motive," nevertheless "had political impact in the placement of every line." J.S., at 21a. This was because the court's minimalist approach to drawing the new lines meant – as the court expressly found below – that, as a practical matter, "the plan produced by this court *perpetuated much of the 1991 Democratic Party gerrymander*." J.S., at 13a (emphasis added); *see also* J.S., at 21a, 22a.

Both African-American and Hispanic plaintiffs urged the *Balderas* panel to draw new majority districts for their respective minority populations – the Hispanic plaintiffs insisted that the court-drawn plan "contain seven Latino registration majority districts" in South and West Texas, and the African-American plaintiffs argued for a new African-American opportunity district in the Houston area. J.S., at 211a. The panel found that neither group had demonstrated that, in the absence of their proposed districts, their voting strength would be diluted in violation of §2 of

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federal court plan likewise added two seats while causing the least disruption possible to the existing plan, J.S., at 207a; *see also* J.S., at 208a ("It was plain that . . . no incumbent was paired with another incumbent or significantly harmed by the plan."). As a result, all 28 incumbents who ran for reelection retained their seats. Thus, the basic political choices embodied in the Legislature's 1991 plan remained intact throughout the 1990s, preserving the districts, many of which had been drawn to be non-competitive, of incumbent Democratic members of Congress.

[18] As the district court later explained, "[o]nce the panel had left majority-minority districts in place and followed neutral principles traditionally used in Texas . . . the drawing ceased, leaving the map free of further change except to conform it to one-person, one-vote." J.S., at 21a.

[19] Congressman Martin Frost, of old District 24, was at that time one of the three most senior Democratic members of Texas's congressional delegation. He testified that he believed that the district court had drawn his district to protect him for that reason. J.A., at 248.

the Voting Rights Act. J.S., at 211a. And, recognizing that both groups "present[ed] competing positions, reflecting a political reality that they are competitors in the political process," J.S., at 211a, the court declined to accommodate their requests.

Whether to draw another majority-minority district, either for African-Americans or for Hispanics, the court reasoned, was "a quintessentially legislative decision, implicating important policy concerns." J.S., at 209a. Therefore, the panel noted, "[t]he matter of creating such a permissive district is one for the legislature." J.S., at 212a.

After completing its "unwelcome" task of drawing a remedial map, J.S., at 202a, the court "ultimately ordered that Plan 1151C would govern the 2002 congressional elections." J.S., at 60a. Plaintiffs representing certain Hispanic voters appealed to this Court, "arguing that the panel erred by not drawing an additional Hispanic district in the Southwest region of the state." J.S., at 60a. The Court summarily affirmed. J.S., at 60a.

In the 2002 election, the *Balderas* court's map, reflecting its lineage "perpetuating" the 1991 gerrymander, translated a 53.3% to 43.9% Republican majority of the votes cast for Congress into a 17 to 15 Democratic majority in the congressional delegation.[20]

**The 2003 Redistricting Plan**

In 2003, for the first time in over a decade, the Texas Legislature passed a congressional redistricting plan, Plan 1374C. But not without some difficulty. In May 2003, late in the Regular Session of the 78th Legislature, a group of Democrats in the Texas House of Representatives left the State, spending four days in Oklahoma to prevent a quorum and avoid redistricting legislation.[21] The session ended without passing a redistricting plan, and so Governor Rick

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[20] *See* Race Summary Report 2002 General Elections, *available at* Election Returns Database, *supra* note 3.

[21] *See* Tr. 12/15/03 PM, at 75:23-77:7 (Rep. Richard Raymond); *see also* J.S., at 60a.

Perry called a special session of the Legislature to take up redistricting. Although the House passed a new plan in that session, the informal Senate tradition of requiring a 2/3 vote to take up legislation allowed the Senate Democrats to prevent a vote on the House's plan.[22] In a second special session, Lieutenant Governor Dewhurst announced that the practice of requiring a super-majority vote to take up a bill would not be used for redistricting legislation[23] – and this time twelve Democratic Senators left Texas, spending a month in New Mexico to prevent a quorum in the Senate.[24] Thus, over the course of three legislative sessions, the minority party was systematically able to prevent the majority party's attempt to replace an antimajoritarian congressional map.

When one Democratic Senator chose to return to Texas following the second called session, Governor Perry called a third special session. It was during this session that Plan 1374C, the first legislatively-drawn congressional map produced for the State of Texas in more than twelve years, was enacted. *See* J.S., at 60a.

The trial record confirms that Plan 1374C – did not result from any single motivation, be it partisan or otherwise. Many of the choices about where to draw district lines were made out of respect for local political boundaries. For example, the Legislature decided to keep the City of Arlington, a city in

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[22] *See* J.S., at 60a.

[23] Eleven Democratic legislators filed suit in federal district court alleging that the decision not to invoke the 2/3-vote informal tradition in the Texas Senate was a change in the rules governing voting requiring §5 preclearance by the Department of Justice. The Department of Justice concluded that it was not; the three-judge court, in turn, found that Dewhurst's decision would "affect the distribution of power between legislators of two different parties" rather than "directly affect the voters," and so preclearance was not required. *Barrientos v. Texas*, 290 F.Supp. 740, 740 (S.D. Tex. 2003) (three-judge court). This Court summarily affirmed. *Barrientos v. Texas*, 541 U.S. 984 (2004).

[24] *See* Tr. 12/17/03 PM, at 119:3-17 (Sen. Royce West) ("So we felt compelled to use that rule to leave the State of Texas in order to make sure that no business would be conducted, specifically the business of redistricting the State of Texas."); *see also*, J.S., at 60a.

Tarrant County between Dallas and Fort Worth that has a history of being split into multiple districts, whole within CD 6.[25] It decided to keep the City of Harlingen, in the southern region of the State, whole in CD 15.[26] And it chose to keep certain small, rural counties in East Texas whole in CD 5,[27] and Jefferson County whole within CD 2.[28]

The Legislature also honored many requests to keep particular cities and counties within particular districts. For example, Parker and Wise counties were placed in CD 12 at the request of a state representative from Parker County.[29] Aransas County was "put back into CD 14 historically where it had been."[30] Portions of Harris and Fort Bend counties were restored to CD 18, the district held by Democratic Congresswoman Sheila Jackson Lee.[31] Angelina County, which preferred not to be placed with The Woodlands and Montgomery County, was placed into CD 1 with about a dozen East Texas counties.[32] Other similar requests were honored.[33]

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[25] *See* Tr. 12/18/03 AM, at 77:14-25 (Bob Davis) (noting that Rep. Grusendorf would not support any plan that split Arlington into multiple congressional districts); *id.*, at 103:19-21; J.A., at 282.

[26] *See* Tr. 12/18/03 AM, at 83:13-84:14 (Bob Davis).

[27] *See* Tr. 12/18/03 AM, at 97:7-12; 100:20-22 (Bob Davis) (noting that this was done at the request of Senator Staples).

[28] *See* Tr. 12/18/03 AM, at 97:24-98:3 (Bob Davis).

[29] *See* Tr. 12/18/03 AM, at 79:19-24 (Bob Davis) (noting that this was done at the request of Representative Phil King); *id.*, at 108:12-14.

[30] *See* Tr. 12/18/03 AM, at 89:20-22 (Bob Davis).

[31] *See* Tr. 12/18/03 AM, at 94:20-95:8 (Bob Davis); Tr. 12/18/03 PM, at 242:17-243:6 (Bob Davis).

[32] *See* Tr. 12/18/03 AM, at 97:17-21 (Bob Davis).

[33] *See also* Tr. 12/18/03 AM, at 99:8-22 (Bob Davis) (explaining that a deal made between Senator Shapiro and Senator Ratliff resulted in Congressional District 3 including part of Dallas County, as it historically had, and Congressional District 4 avoiding Dallas County); Tr. 12/18/03 AM, at 100:15-20 (Bob Davis) (noting that, at Senator Staples's request, Dallas County's influence in Congressional District 5 was reduced to make the district more rural).

Other decisions placed constituencies in a particular district. Congressman Lamar Smith wanted the University of Texas in his district, CD 21.[34] Requests were also honored to place Texas State University, a smaller public university approximately thirty miles away, in a different district than the University of Texas.[35] Fort Hood and the agricultural areas in Coryell, Hamilton, and Erath counties were placed in CD 31.[36]

The record also shows that Democratic legislators played an active role in these decisions. Indeed, Plan 1374C honored a number of the Democrats' requests. African-American Democratic Representative Glenn Lewis requested that his Texas House District be kept whole, and the leadership in the Texas House committed to honoring that request.[37] Thus, legislative district 95 was placed in CD 26.[38] At the request of Hispanic Democratic Senator Hinojosa, the cities of Mission and Edinburg were kept whole.[39] The southern Dallas suburbs of DeSoto and Lancaster were added into CD 30, Congresswoman Eddie Bernice Johnson's district.[40] African-American Democratic Representative Ron Wilson's legislative district was kept whole and placed in CD 9, the new Houston-area African-American opportunity district.[41] And Hispanic Democratic Representative Vilma Luna, a member of the Redistricting Committee,[42] requested that CD 27 reach further north and

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[34] *See* Tr. 12/18/03 AM, at 113:10-20 (Bob Davis).

[36] *See* Tr. 12/18/03 AM, at 90:20-91:13 (Bob Davis).

[38] *See* Tr. 12/18/03 AM, at 121:21-122:3 (Bob Davis); *see also* J.A., at 282-83 (explaining that economic considerations regarding Wise County led it to be placed in Congresswoman Kay Granger's district).

[37] *See* Tr. 12/18/03 AM, at 78:1-9 (Bob Davis); J.A., at 282.

[38] *See* Tr. 12/18/03 AM, at 76:23-77:4 (Bob Davis).

[39] *See* Tr. 12/18/03 AM, at 89:2-16 (Bob Davis).

[40] *See* Tr. 12/18/03 AM, at 120:8-14 (Bob Davis).

[41] *See* Tr. 12/18/03 PM, at 68:10-12 (Rep. Wilson).

[42] *See* Tr. 12/18/03 PM, at 139:10 (Rep. King).

that it include economic interests such as the northern part of the Port of Corpus Christi and the port of Ingleside.[43]

The map that the Legislature adopted, Plan 1374C, went from two African-American opportunity districts (old CDs 18 and 30) to three (new CDs 9, 18, and 30), and from seven majority Hispanic voting-age population (VAP) districts to eight.[44] For that reason, some legislators referred to the new map as an "8-3" map, replacing the prior "7-2" map.[45] Although Plan 1374C did increase minority-opportunity districts, it also eliminated the 1991 gerrymandered lines protecting Anglo Democrats, which resulted in strong Democratic opposition to the plan.

In the end, two Democrats, Representatives Ron Wilson and Vilma Luna voted for Plan 1374C. Representative Wilson, an African-American Democrat from Houston, voted for the redistricting plan because, as he testified, the plan would provide an additional opportunity for African-Americans to elect a member of Congress and "advance the interests of my community." J.A., at 276-78, 281. Representative Luna, an Hispanic Democrat originally from the South Texas town of Alice, Texas, also voted for the plan. The bill containing Plan 1374C was enacted in October 2003. *See* H.B. 3, 78th Leg., 3d C.S. (2003).

Appellants and other plaintiffs who disagreed with the Legislature's policy choices immediately filed suit seeking to freeze in place the policy choices embodied in the prior map or – in the case of the GI Forum Appellants – to force the State to adopt an entirely new map.

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[43] *See* Tr. 12/18/03 AM, at 110:14-18, 118:4-15 (Bob Davis).

[44] Although the Hispanic citizen voting-age population (CVAP) in old CD 23 was reduced under 50%, Plan 1374C created new CD 25, which also had Hispanic CVAP over 50% and which, unlike CD 23, regression analyses demonstrated would be controlled by Hispanic voters. J.S., at 136a, 139a, 147a-48a.

[45] *See, e.g.*, Tr. 12/18/03 PM, at 178:16-18 (Rep. King).

## B. Proceedings In This Litigation

### 1. *Session v. Perry*

The plaintiffs brought a broad array of challenges against the State's plan. They argued that, either by constitutional provision or by statute, Texas was prohibited from redistricting "mid-decade"; they alleged that the State's plan unconstitutionally discriminated on the basis of race; they asserted that it constituted an unconstitutional partisan gerrymander; and they argued that a number of the districts in Plan 1374C diluted minority voting strength in violation of §2 of the Voting Rights Act. J.S., at 57a.

Following extensive discovery, two weeks of trial, and dozens of witnesses, the three-judge federal court affirmed the legality of the plan in all respects. The court carefully weighed the evidence, assessed the credibility of the witnesses, sifted through the facts concerning each contested congressional district, and issued a thorough opinion affirming the legality of Plan 1374C. J.S., at 57a-200a.

Addressing the plaintiffs' "mid-decade" arguments first, the court noted a wealth of judicial authority "implicitly reject[ing] the notion that a state may impose only one redistricting map each decade." J.S., at 64a. Finding "no provision in either the U.S. Constitution, federal law, or state law that proscribes mid-decade redistricting," J.S., at 81a, the court concluded that Plan 1374C could not be invalidated on "mid-decade" grounds, "particularly where, as here, the State's action follows a court-imposed map," J.S., at 67a.

The court next unanimously rejected the allegation that the State's plan was an unconstitutional racial gerrymander, concluding that "Plaintiffs have failed to prove purposeful racial discrimination." J.S., at 81a. The court credited testimony describing the "political give-and-take by legislative members" driving the State's plan, and concluded that "politics, not race, drove Plan 1374C." J.S., at 88a.

Noting that "[t]he question remains how much of a role the judiciary ought to play in policing the political give-and-take of redistricting," the three-judge court likewise had "no hesitation in concluding that, under current law, this court cannot strike down Plan 1374C on the basis that is an

illegal partisan gerrymander." J.S., at 91a. Despite Appellants' assertions that the State's "sole" intent in the redistricting process was "partisan gain," *see, e.g.*, Jackson Br., at 12, the district court found other important legislative purposes were present. *See* J.S., at 85a-89a.

Turning finally to the allegations of vote dilution under §2, the court spent the bulk of its lengthy opinion detailing the evidentiary and testimonial support for its ultimate conclusion that the State's plan did not, as a matter of fact, dilute minority voting strength in Texas. J.S., at 58a, 93a-170a. Of particular relevance to this appeal, the district court rejected the claim that changes made in the State's map to old CD 24[46] diluted African-American voting strength – the court found that the plaintiffs had failed to demonstrate cohesion among old CD 24's 21.4% African-American voting-age population, J.S., at 112a; that the lack of cohesion among the old district's African-American and Hispanic populations in primary elections was beyond dispute, J.S., at 111a; and that to the extent African-Americans had "opportunity" in old CD 24, it was *dependent* upon "Anglos who vote with them in the general election for Democrats," J.S., at 111a. The court credited testimony that old CD 24 had been drawn by an Anglo Democrat, and for an Anglo Democrat, and noted that the same Anglo Democrat "had not had a primary opponent since his incumbency began." J.S., at 111a. On that record, the court expressly found "that Anglo Democrats control this district is the most rational conclusion." J.S., at 111a-112a. The panel thus concluded that old CD 24 was not a district protected by §2. J.S., at 113a.

The district court also rejected the allegations that the State's plan diluted Hispanic voting strength in South and West Texas. The district court heard evidence about old CD 23's performance under the prior court-drawn plan, under the State's plan, and under the demonstration plan

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[46] In this brief, "old CD" refers to a congressional district in Plan 1151C used in the 2002 elections, while "new CD" refers to a congressional district in Plan 1374C used in the 2004 elections.

The court concluded that, under the 2001 plan, old CD 23 "was not an effective minority opportunity district." J.S., at 131a. It "had a bare majority of Hispanic citizen voting age population" but was not electing the Hispanic candidate of choice, instead electing an Hispanic Republican, Henry Bonilla. J.S., at 119a. The court also considered new CD 23 under the State's plan, concluding that – just as under the court-drawn plan – it is not an Hispanic-opportunity district. J.S., at 134a. As it was still located in South and West Texas, new CD 23 retained a majority Hispanic total population and voting-age population. But it no longer had its former nominal majority of Hispanic citizen voting-age population. J.S., at 119a.

The changes in CD 23 were produced through the political process of redistricting. As the three-judge court found, "the Legislature sought to apply to South and West Texas its primary partisan goal" while avoiding violations of the law. J.S., at 119a. The court explained how the political goal of aiding the incumbent Representative for CD 23, Congressman Bonilla, interacted with the demographics of the region. "The record presents undisputed evidence that the Legislature desired to increase the number of Republican votes cast in District 23 to shore up Bonilla's base and assist in his reelection." J.S., at 119a. To increase that base, the district was expanded north to take in roughly 100,000 people who largely voted Republican. J.S., at 119a. To equalize population, the lines were contracted along the southern end by moving the boundary within Webb County, removing approximately 100,000 people (many of whom were Hispanic) who largely voted Democratic. J.S., at 119a-20a.

The district court heard evidence about the split in Webb County, including evidence about why the State had chosen to split the county and how it had drawn the particular district lines, principally along Interstate 35. "The State presented undisputed evidence that the Legislature changed the lines of CD 23 to meet the political purpose of making the district more Republican and protecting the incumbent, Congressman Bonilla. Plaintiffs agree that the primary purpose of this change was political and concede

that there is a strong correlation between Latino and Democratic voters." J.S., at 156a.

On the basis of this testimony, the district court found that "the State provided credible race-neutral explanations for Plan 1374C's county cuts. . . . The legislative motivation for the division of Webb County . . . was political." J.S., at 158a. The district court found that the line drawn through Webb County "in part used the interstate highway as a district boundary, deviating where necessary to achieve population balance." J.S., at 159a. The district court ultimately found that there was "credible testimony that the numerous decisions embodied in the location of each district line combined the broad political goal of increasing Republican seats with local political decisions that are the most traditional of districting criteria." J.S., at 160a-61a.

And with respect to CD 25, which Appellants describe with invective – "absurdly misshapen," "absurdly noncompact," "far-flung," and "bizarre," Jackson Br., at i, 3, 16, 43 – the district court found that the elongated shape of new CD 25, like that of new CD 15 and new CD 28, is the direct result of unique Texas geography. *See* J.S., at 154a ("Texas geography and population dispersion limit the availability of district compactness in the southern and western regions of the state."); J.S., at 164a ("Plaintiffs' evidence has not demonstrated that the linking of disparate border and Central Texas Hispanic communities was caused by the factor of ethnicity, rather than the factors of geography and population distribution."). After hearing evidence concerning the line-drawers' intent and assessing credibility, the panel made the factual finding that politics, not race, predominated in new District 25. J.S., at 162a-65a.

Five plaintiff groups appealed *Session v. Perry* to this Court, which, in turn, vacated the district court's judgment and remanded the case for further consideration in light of the Court's intervening partisan-gerrymandering decision in *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

### 2. *Henderson v. Perry*

On remand, the district court reconsidered the plaintiffs' partisan-gerrymandering claims in light of *Vieth*'s holding that such claims could not be adjudicated without a consensus-garnering metric by which to judge the political fairness of the challenged map. The court had no difficulty concluding that the "claims of excessive partisanship before us [still] suffer from a lack of any measure of substantive fairness." J.S., at 1a. The court noted that none of the plaintiffs could state "with clarity the precise constitutional deficit" in the State's map, and that "[a]lthough the lead plaintiffs invoke the structure of equal protection analysis, they identify no suspect criterion or impinged fundamental interest." J.A., at 1a-2a.

Without any substantive metric by which to measure the political fairness of the State's map, the district court compared it to the map the Court had sustained against partisan-gerrymandering challenge in *Vieth*. It concluded that the "Texas plan is not more partisan in motivation or result, including the impact on the number of competitive districts, than the Pennsylvania plan upheld in *Vieth*." J.S., at 31a. Because no plaintiff had successfully "identified a way to invalidate the Texas plan under the standards they urge as surviving *Vieth*," the court found that the State's plan could not be struck down as a partisan gerrymander. J.S., at 1a.[47] The district court reaffirmed in all respects its prior decision in *Session*, and rendered judgment in favor of the State on all claims. J.S., at 56a.

Following the judgment on remand, eight direct appeals were filed. The Court noted probable jurisdiction over four, and consolidated them for argument.

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[47] On remand, the court considered plaintiffs' assertion that the State should not be permitted to rely on the 2000 census population data to construct its plan in 2003. The district court correctly rejected this argument as a thinly-veiled attempt to "limit[] mid-decade 'voluntary' redistricting in order to limit political gerrymandering." J.S., at 37a.

## SUMMARY OF THE ARGUMENT

This case is fundamentally about democracy. For the first time in twelve years, the elected Legislature of the State of Texas succeeded in carrying out its constitutional duty to pass a congressional redistricting plan. That plan, in turn, reflected the consistent, demonstrated preferences of the voters in Texas by allowing a substantial majority of voters (nearly 60%) to elect a commensurate majority of the congressional delegation.

Appellants ask the Court to set aside that legislatively adopted plan, and to instead order a return to a plan perpetuating one of the "shrewdest" partisan gerrymanders of its time. The plan they champion had, for a full decade, frustrated the will of Texas voters by giving Democrats consistent control of the congressional delegation despite their never mustering a majority of the votes. Indeed, from 1996 to 2002, Democrats never garnered more than 44 percent of the statewide vote, and yet they retained a decided advantage in the congressional delegation.

Three overarching principles resolve this case. *First*, claims of partisan gerrymandering necessarily turn on substance, not mere timing. Appellants disavow any challenge to the substantive fairness of Plan 1374C – because no coherent standard of fairness could deem that plan less fair than its predecessor plan – and instead attack only the timing of the plan's enactment. That disavowal is fatal to their claim.

*Second*, the Constitution and decades of the Court's precedents assign primacy in redistricting to elected state legislatures, not the courts. Appellants' mid-decade and derivative one-person one-vote arguments invert the constitutional structure, elevating courts to the role of primary policymakers in redistricting. Their proffered test – that once a court has enacted a "legal" map, the elected legislature is forbidden from making any changes to that judicial creation – would work a dramatic alteration in the allocation of authority between the courts and

the political branches and would require overruling four decades of this Court's precedents.

*Third*, the Voting Rights Act protects race, not party. In 2003, the Texas Legislature choose to create two additional minority-opportunity districts: a new African-American opportunity district (new CD 9) and a new Hispanic-opportunity district (new CD 25). In so doing, the Legislature eliminated the 1991 gerrymandered lines protecting a number of rural Anglo Democrats. As a result, Appellants charge, the new map violated the Voting Rights Act. But the Act protects minority voting rights, not the ensured election of one particular political party. And, under the Voting Rights Act, the map *expanded* minority opportunity, while at the same time restoring democratic accountability to the Texas congressional map.

The three-judge district court conducted a full trial, heard extensive testimony, and made detailed fact findings on each of Appellants' claims. The district court correctly concluded that Appellants' partisan gerrymandering claims, "mid-decade" redistricting claims, and one-person, one-vote claims (which were merely disguised "mid-decade" claims) were without foundation in law, and contrary to this Court's precedents. The district court likewise concluded that, as a factual matter, Appellants had failed to prove their Voting Rights Act claims and their racial gerrymandering claims. Those factual findings were not clearly erroneous and, indeed, were abundantly supported by the record. Accordingly, the Court should affirm the judgment of the district court in its entirety.

## ARGUMENT

Despite the multiplicity of questions presented in these consolidated appeals, at base Appellants raise just five broad categories of claims:

*First*, several Appellants argue that the 2003 Texas redistricting constituted an unconstitutional partisan gerrymander under *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

*Second*, several Appellants contend that what they term "mid-decade" redistricting is constitutionally impermissible, either in conjunction with the alleged partisan gerrymander or as a derivative consequence of the Court's one-person one-vote standards.

*Third*, several Appellants argue that the alteration of specific districts, namely old CD 24 and CD 23, ran afoul of the Voting Rights Act.

*Fourth*, the Jackson Appellants contend that the creation of new CD 25 constituted an unconstitutional racial gerrymander.

And *fifth*, the GI Forum Appellants argue that the State of Texas was obligated under the Voting Rights Act to create one additional Hispanic-opportunity district.

Each of these claims was tried before a three-judge federal district court, and each was squarely rejected. None withstands careful scrutiny.

### I. THE 2003 TEXAS REDISTRICTING WAS NOT AN UNCONSTITUTIONAL PARTISAN GERRYMANDER.

The Court first opened the door, albeit just slightly, to partisan gerrymandering claims in *Davis v. Bandemer*, 478 U.S. 109 (1986). In that opinion, the Court concluded that such claims could in theory be justiciable, but that to prevail plaintiffs had to demonstrate both discriminatory "intent[]" and an "actual discriminatory effect." *Id.*, at 127. The first prong has never been much of a barrier: "As long as redistricting is done by a legislature," the *Bandemer* Court observed, intent is "not very difficult to prove." *Id.*, at 128.

The second prong, however, proved far more formidable. As the Court explained,

> "the question is whether a particular group has been unconstitutionally denied its chance to effectively influence the political process. . . . [A] finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process." *Id.*, at 132-33.

The inquiry was one of *process*, not specific election outcomes;[48] as long as members of the plaintiff party were not prohibited from participating in the process, and so theoretically affecting the outcome, there was no discriminatory effect. As the Western District of Texas explained – in rejecting a political gerrymandering claim brought by Republicans to the 1991 Texas map – to prevail, a political party must show that it "cannot over the long haul counteract this tactic through its influence in another relevant political structure or structures." *Terrazas II*, 821 F.Supp. at 1174. Such systematic exclusion from the political process rarely happens, and so, in the decades after *Bandemer*, no court ever found an actual discriminatory effect. J.S., at 8a & n.16.[49]

Appellants attempted to meet the *Bandemer* standard, and, based on the evidence presented, the three-judge court unanimously rejected that claim. J.S., at 91a

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[48] As *Bandemer* explained, merely losing elections is not enough because "[a]n individual . . . who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as the other voters in the district." 478 U.S., at 131-32.

[49] As the three-judge court expressly found:

> "*In Texas, redistricting advantages can be overcome through the political process.* The exchange of political advantage between the Democrats in 1990 and the Republicans in 2000 demonstrates that reality. If the Democratic party takes the main statewide offices, Democrats can block a state legislative redistricting plan and write their own through the Legislative Redistricting Board. The resulting State Legislature could then redraw the congressional lines." J.S., at 92a (emphasis added).

("We have no hesitation in concluding that, under current law, this court cannot strike down Plan 1374C on the basis that it is an illegal partisan gerrymander."); *see also* J.S., at 172a (Ward, J., concurring in part and dissenting in part).

The test by which Appellants hoped to meet *Bandemer* was precisely identical to the test advocated in *Vieth*: (1) "predominant intent to achieve unfair partisan advantage" and (2) "the effect of so skewing electoral outcomes that Democrats would have no chance of winning a majority of seats . . . even if they repeatedly won a narrow majority of the votes statewide." *See* Jackson Tr. Br., at 34 (Dec. 3, 2003) (citing *Bandemer*, 478 U.S. 109).

The overlap with *Vieth* was not by accident. Indeed, lead counsel for the Jackson Appellants returned from presenting oral argument in *Vieth* on December 10, 2003, and advanced the very same theory on December 11, the opening day of trial in Texas. And Appellants' principal expert witness, Allan Lichtman,[50] was the very same expert that lead counsel relied upon in *Vieth* to support their theory of partisan effect.[51] Thus, Appellants candidly acknowledged, their theory "*match[ed]* the one . . . proposed to the Supreme Court in *Vieth*." Jackson Tr. Br., at 34 (Dec. 3, 2003) (emphasis added).

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[50] In the Texas case, the Jackson Plaintiffs relied on Lichtman to analyze the voting rights issues and John Alford to analyze partisan gerrymandering; Alford, in turn, utilized the identical methodology as had Lichtman in *Vieth*. *See, e.g.*, Appellants' Reply Br., at 9-12, *Vieth v. Jubelirer* (No. 02-1580).

[51] At trial, the centerpiece of Appellants' theory was a model of "fairness" built on a statistical model of statewide proportionality – a prediction of how many individual congressional seats should be won by a party that receives a particular share of the statewide vote. *See* Jackson Tr. Br., at 34 (Dec. 3, 2003). In particular, the Jackson Plaintiffs argued for what they called "majoritarianism," *i.e.*, that a violation of the Constitution could be shown if, in a hypothetical future election in which Democrats were to win a majority of the votes statewide, they would likely not be able to translate that majority of votes into a majority of the State's delegation in the House of Representatives. *See* Jackson Post-Tr. Br., at 68-69 (Dec. 20, 2003).

*Vieth*, of course, categorically rejected the proportionality-based statewide models offered by Plaintiffs. *See Vieth*, 541 U.S., at 288 (plurality opinion) ("[T]he Constitution contains no such principle."); *id.*, at 308 (Kennedy, J., concurring) ("The fairness principle appellants propose is that a majority of voters in the Commonwealth should be able to elect a majority of the Commonwealth's congressional delegation. There is no authority for this precept."); *see also id.*, at 318 (Stevens, J., dissenting) ("Plaintiff-appellants urge us to craft new rules that in effect would authorize judicial review of statewide election results to protect the democratic process from a transient majority's abuse of its power to define voting districts. I agree with the Court's refusal to undertake that ambitious project."); *id.*, at 346-47 (Souter, J., dissenting) (rejecting statewide claims as judicially unworkable until experience is gained with district-level claims).[52]

Given the substantial identity between the theory plaintiffs advanced at trial and the theory rejected in *Vieth*, the district court had little difficulty rejecting Appellants' partisan gerrymandering claims – again unanimously – on remand following the decision in *Vieth*. J.S., at 1a-2a; *id.*, at 45a (Ward, J., specially concurring).

Having failed to persuade the district court, Appellants have chosen on appeal to advance two additional, different versions of their theory, neither of which meets the challenge of *Vieth*.

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[52] The only Justice who even entertained the *Vieth* plaintiffs' statewide theory was Justice Breyer, who limited his concern to a situation where an actual political majority was being thwarted by a political minority. *See id.*, at 360-61 (Breyer, J., dissenting). That concern is not present here. The other three dissenting Justices wrote that, although they believed political-gerrymandering claims to be justiciable, they would confine them to district-specific claims rather than statewide models of proportional representation such as offered by Appellants. *See Vieth*, 541 U.S., at 327-28, 339 (Stevens, J., dissenting); *id.*, at 346 (Souter, J., dissenting).

### A. The Court's Decision In *Vieth*.

In 2004, the Court again took up the question of partisan gerrymandering. A majority of the Court held that the *Vieth* appellants' theories – and those of the various *amici* and those proposed by the dissenting Justices – were inadequate to state a claim. The four-Justice plurality would have held that all political-gerrymandering claims are nonjusticiable. *Vieth*, 541 U.S., at 281 (plurality opinion). Justice Kennedy concurred in the judgment, agreeing that none of the gerrymandering theories that had yet been offered to the Court could form the basis of a viable claim. *Id.*, at 308, 317 (Kennedy, J., concurring).

The four-Justice plurality and Justice Kennedy's concurrence did not disagree about the futility of the claims before the Court. Justice Kennedy expressly agreed with the plurality's rejection of the potential political-gerrymandering tests that had been proposed to, or suggested by, Members of the Court. He rejected the plaintiffs' proposed principle that "a majority of voters . . . should be able to elect a majority of the . . . congressional delegation," and affirmed the plurality's rejection of "the other standards that have been considered to date." *Id.*, at 308 (Kennedy, J., concurring). He also rejected the *Bandemer* standard and those standards offered by the dissenting Justices. *See id.* (Kennedy, J., concurring) (the plurality opinion "demonstrat[es] that the standards proposed in [*Bandemer*], by the parties before us, and by our dissenting colleagues are either unmanageable or inconsistent with precedent, or both").

Thus, a majority held that the *Vieth* plaintiffs' complaint was properly disposed of at the pleading stage, *id.*, at 306 – that there was no need to provide an opportunity for the plaintiffs to replead because there was no viable claim available for them to plead. As Justice Kennedy observed, "[b]ecause there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational

rights." *Id.*, at 307-08. Without such standards, court intervention is inappropriate. *Id.*, at 307.

### B. Appellants' "Sole Intent" Argument Does Not State A Claim Of Partisan Gerrymandering Under *Vieth*.

Faced with the mandate from Justice Kennedy for future litigants to work over time to develop a consensus on "substantive principles of fairness" whereby to measure partisan effect, Appellants have chosen simply to give up on the task. Because the second prong of *Bandemer* (effects) was too difficult to meet, and because developing judicially manageable standards is at least currently not feasible, Appellants instead propose abandoning the inquiry altogether. Thus, Appellants urge the Court to renounce any inquiry into effect, and to rely instead solely on the first prong of *Bandemer*: partisan intent.

Appellants frame this alteration as an advantage – freed from the burden of having to prove discriminatory effect, they suggest their claim is straightforward:

> "Appellants' current claim alleviates the justiciability concerns expressed in *Vieth*, because it *does not ask a court to determine how much bias is too much*." Jackson Br., at 17 (emphasis added).

Of course, a "substantive principle of fairness" to determine "how much bias is too much" is precisely what Justice Kennedy said was needed, and it is what Appellants have chosen to make no attempt to provide.

Instead, Appellants propose two alternatives: first, that a redistricting map undertaken for "solely" partisan purposes (*i.e.*, that really, really meets *Bandemer* prong one), is by virtue of that unconstitutional; and second, that a redistricting may be presumed to be "solely" partisan, when undertaken mid-decade. The second argument – Appellants' mid-decade/partisan gerrymandering hybrid – will be addressed in Part II, *infra*. But the first argument – that "sole" partisan purpose is enough – was squarely rejected by *Vieth*.

Appellants urge that "the opinions in *Vieth* strongly support the conclusion that a redistricting plan undertaken solely to achieve partisan advantage, and serving no other

purpose, necessarily violates the Constitution." Jackson Br., at 17. Under this theory, *Vieth* apparently made it easier to bring political gerrymandering claims by eliminating the "effects" prong of *Bandemer* and clearing the way for claims based only on a sufficient showing under the "intent" prong. No fair reading of *Vieth* yields such a conclusion.

**1. *Vieth* rejected the notion that allegations of "sole," "predominant," or "only" partisan intent suffice to state a claim.**

At trial in this case, the Jackson Appellants argued for a "predominant intent" standard by which a court would evaluate whether partisan motives were excessive where the Legislature "sacrificed other neutral and legitimate criteria to that overriding [political] goal." *See* Jackson Tr. Br., at 34 (Dec. 3, 2003); Jackson Post-Tr. Br., at 67 (Dec. 22, 2003). That argument mirrored the allegations in *Vieth*, which the Court rejected as insufficient. In *Vieth*, one plaintiff "allege[d] that the new districting plan was created '*solely*' to effectuate the interests of Republicans, and that the General Assembly relied '*exclusively*' on a principle of 'maximum partisan advantage' when drawing the plan." 541 U.S., at 318-19 (Stevens, J., dissenting) (emphases added). And, given the procedural posture of *Vieth* – in which the Court was reviewing the grant of a motion to dismiss – those allegations were presumed to have been true. *See, e.g., Hughes v. Rowe*, 449 U.S. 5, 10 (1980) (noting that the allegations of a complaint are taken as true for purposes of a motion to dismiss).

As the three-judge district court noted, Justice Stevens *in dissent* argued for the very same test as do the Jackson Appellants, focusing precisely on whether a particular "map was drawn 'solely' and 'exclusively' for political ends," J.S., at 16a (citing *Vieth*, 541 U.S., at 317-19 (Stevens, J., dissenting)). Appellants did not hide from that fact; indeed, they affirmatively cited Justice Stevens' dissent as authority for their proposed "sole" purpose test. *See* Jackson Br. on Remand, at 10 (docket #200) (citing *Vieth*, 541 U.S., at 339 (Stevens, J., dissenting)). Thus, the three-judge court concluded,

> "[w]e are persuaded that the Jackson Plaintiffs offer a standard for measuring an excessively partisan redistricting plan that is *functionally equivalent to the standard offered in Justice Stevens's dissent*." J.S., at 16a (emphasis added).

A majority in *Vieth* explicitly rejected the standard proposed by Justice Stevens (and urged today by Appellants). *See Vieth*, 541 U.S., at 292-94 (plurality opinion); *id.*, at 308 (Kennedy, J., concurring) (concluding that the plurality opinion "demonstrat[es] that the standards proposed in [*Bandemer*], by the parties before us, and *by our dissenting colleagues* are either unmanageable or inconsistent with precedent, or both" (emphasis added)).

Instead, the Court acknowledged that political concerns are an inevitable part of any legislative process, especially one with the real-world political consequences of redistricting. *Id.*, at 286 (plurality opinion). And the Court made plain that intent alone cannot be sufficient – even an allegation of intent preceded by intensifiers like "sole," "only," or "predominant." *See id.*, at 285 (plurality opinion) ("Vague as the 'predominant motivation' test might be when used to evaluate single districts, it all but evaporates when applied statewide."); *id.*, at 306-07 (Kennedy, J., concurring); *see also Bandemer*, 478 U.S., at 128 ("As long as redistricting is done by a legislature," partisan intent is "not . . . very difficult to prove.").

That result should control here, where Appellants offer no more than a collection of similar intensifiers in front of the word "partisan." No matter how many times they say "sole," "exclusive," or even "really super duper," *Vieth* rejected their proposed standard.

**2. Even if proof of "solely" partisan intent could make out a claim, the Texas Legislature made a wide range of additional legitimate policy judgments in the adoption of its map.**

Even if Appellants' proposed "solely"-partisan test were the law, on this record the State's map would pass it. In aid of their claim that the map was motivated by "solely"

partisan intent, Appellants rely on two sleights of hand. First, they assert that the State conceded, and the district court found, that the intent was "solely" partisan. And second, they attempt to shift the focus from the traditional focus in gerrymandering claims – namely on the specific lines chosen by map-makers in drawing the map – to the antecedent decision whether to draw the map at all. Neither misdirection is sound.

**a. The State did not "concede" and the district court did not "find" that the map was "solely" partisan.**

As support for a supposed "admission" that partisan maximization was the "*sole* motivation" of the Legislature, Appellants rely on incomplete snippets of testimony or evidence explaining that "politics" was the primary driver behind the decision to revisit redistricting in 2003 or behind certain lines drawn on the map. *See, e.g.*, Jackson Br., at 12-13; LULAC Br., at 8. What they fail to acknowledge is that the vast majority of these references involved a distinction between politics (as a permissible consideration) and race (an impermissible one). *See, e.g.*, J.S., at 88a ("Plaintiffs' expert testimony supports our conclusion that politics, not race, drove Plan 1374C."). Whatever adverb or adjective was used, the point was clear: the Legislature's purposes were not driven by race.

Although one searches the Jackson Appellants' Statement of the Case in vain for any other mention of the district court's factual findings, four times they cite the court's alleged "finding" of "sole" partisan intent. Jackson Br., at 12, 13, 20 n.18, 27. The court made no such "finding." Of the four references to the court's "finding," only one, on page 12, actually cites the district court opinion. And there, they cite pages 85a and 88a-89a. Tellingly, these pages are *not* from the district court's discussion of partisan gerrymandering; that occurred in a subsequent section of the opinion. Rather, Appellants quote from the district court's rejection of their racial-gerrymandering claim, where, as a counter-point to race, the district court described the countervailing (and dominant) considerations

as "political."[53] That is a far cry from a factual finding that partisan politics was the "sole" consideration in drawing the map.

Indeed, on remand, the district court took direct issue with the Jackson Appellants' "solely" partisan argument:

> "[t]his ignores, as it must, the reality that even with an overarching objective of feathering the party nest, the various cuts and turns of a redistricting plan with its reverberating impacts are infused with a myriad mixtures of local politics and accommodation, inevitably producing lines drawn for a variety of reasons and objectives, often inconsistent with the overall objectives of partisan gains." J.S., at 15a n.38.

**b. The Legislature had multiple additional motivations in drawing the map.**

That being said, there is no disputing that partisan gain was a significant factor behind at least some individual legislators' commitment to redistricting. "As long as redistricting is done by a legislature," partisan intent is "not . . . very difficult to prove." *Bandemer*, 478 U.S., at 128. Of course, politics mattered, but the Legislature had no singular desideratum.[54]

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[53] Indeed, Appellants' mantra from the district court opinion, concerning the "single-minded purpose of the Texas Legislature" is taken from the sentence immediately following the court's conclusion that "Plaintiffs have not proven their claim of racial discrimination." J.S., at 85a. Under Appellants' proposed standard, apparently, the Constitution places States in an intractable dilemma – beating a *Shaw* claim necessarily sets the State up to lose under *Vieth*.

[54] On rational basis review – to which Appellants concede their partisan-gerrymandering claims are subject, *see* Jackson Br., at 18 n.17 – a legislature need not have articulated *any* reason for enacting a statute, and "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *F.C.C. v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993). Thus, Appellants' repeated assertion that the Texas Legislature had a bad purpose for drawing its map – even if it were true – would not overcome the legislative action's "strong presumption of validity" on rational basis review: Appellants have the

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### i. The Legislature's desire to carry out its constitutional duty to redistrict is necessarily a rational purpose for doing so.

On February 11, 2003, at the very outset of the redistricting debate, the Chairman of the House Committee on Redistricting asked the Texas Attorney General for a formal opinion whether the Texas Legislature had a "'mandated responsibility to enact a permanent map for the electoral period 2003 through 2010.'" Op. Tex. Att'y Gen. No. GA-0063 (2003) (quoting Letter from the Hon. Joe Crabb).[55] Turning to the text of the Constitution and carefully surveying this Court's opinions, the Attorney General responded as follows:

> "The United States Supreme Court has reminded parties on many occasions that 'reapportionment is primarily the *duty and responsibility* of the state through its legislature or other body, rather than of a federal court.' *Growe v. Emison*, 507 U.S. 25, 34 (1993) (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975)); *see also, e.g.*, *Branch v. Smith*, 123 S. Ct. 1429, 1444 (2003) ("it certainly remains preferable for the State's legislature to complete its *constitutionally required* redistricting"). . . .
>
> "While the United States Constitution entrusts states with the primary *duty and responsibility* to redraw their congressional districts, U.S. CONST. amend. XIV, §2, and the Texas Constitution vests

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burden "to negate every conceivable basis which might support it." *Id*, at 314-15 (internal quotations omitted).

[55] Texas law permits certain officials, TEX. GOV'T CODE §402.042(b), to request the Attorney General to issue a written opinion "on a question affecting the public interest or concerning the official duties of the requesting person," *id.* §402.042(a). As the Chairman of the House Committee on Redistricting, Representative Crabb was authorized to request an opinion on behalf of the Committee. *See id.* §402.042(b)(7). The legal process for issuing formal Attorney General opinions in Texas bears many similarities to the federal process for the issuance of U.S. Attorney General opinions from the Office of Legal Counsel. *See* 28 U.S.C. §§510-13; Office of Legal Counsel, 28 C.F.R. §0.25(a) (2005).

> redistricting authority in the Texas Legislature, *see* TEX. CONST. art. III, §§1, 28, there exists no mechanism for enforcing this duty. *See generally* Tex. Att'y Gen. Op. No. O-6488 (1945), Tex. Att'y Gen. Op. (To Hon. H.B. Hill, July 21, 1921), 1920-1922 TEX. ATT'Y GEN. BIENNIAL REP. 188 (constitutional provisions requiring legislature to redistrict Texas House and Senate are mandatory in form, but impose no penalty for nonperformance nor provide any other enforcement mechanism). . . .
>
> "Consequently, while courts are empowered to resolve congressional redistricting controversies if the legislature fails to fulfill its duty, courts cannot mandate that the legislature summon political will or muster consensus. There is no judicial remedy to counter legislative noncompliance." Op. Tex. Att'y Gen. No. GA-0063 (2003) (emphases added).

Given that (1) the text of the Constitution, (2) numerous decisions from this Court, and (3) the express legal advice of the State's Attorney General all pointed to a legal "duty and responsibility" (albeit not judicially enforceable) for the Legislature to engage in redistricting, and given that the Legislature had not fulfilled this duty in twelve years, it is – to say the least – a rational basis for the Legislature to have chosen to carry out what it understood to be its constitutional responsibility.[56]

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[56] Given Appellants' repeated emphasis on the notions of "necessary" and "unnecessary" redistricting (defined as redistricting required or not required by threat of judicial order), Appellants would presumably take issue with the Attorney General's legal advice that the Legislature had a live "duty and responsibility" to redistrict, even though no court could force it to do so. For purposes of this argument, however, it makes little difference whether the Attorney General's legal advice was correct (as he believes it was) or incorrect (as Appellants would surely urge); in either case, it is undisputed that he *in fact gave that specific legal advice to the Legislature*, and so it is surely a rational

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### ii. Eliminating what many legislators perceived to be a preexisting partisan gerrymander provided an additional rational basis for the State's map.

The Texas Legislature had an additional, entirely rational reason to decide to redraw the court-drawn map: that map produced antimajoritarian electoral results. Those results provided ample basis to conclude that the preexisting plan was a vestige of a Democratic gerrymander that maintained a Democratic congressional majority despite a consistent majority of congressional votes cast for Republicans statewide. Unsurprisingly, that is just what the district court found. J.S., at 12a-13a, 21a. And there is no dispute that many Texas legislators perceived the prior map to be exactly that: the dead-hand effect of the 1991 Democratic gerrymander. The record is replete with testimony that the Legislature strongly desired "to make the congressional delegation more reflective of state voting trends," J.S., at 88a, and to correct that perceived past gerrymander. That purpose – unraveling a perceived preexisting political gerrymander – is an entirely legitimate, even laudable, legislative purpose.

Curiously, the Jackson Appellants suggest that an intention to make an antimajoritarian map into a majoritarian one is irrational and constitutionally illegitimate. *See* Jackson Br., at 15, 27. This argument is particularly surprising in light of the fact that in *Vieth*, the same counsel urged the Court to adopt a reading of the Constitution that could *require* making antimajoritarian maps majoritarian. *See* Appellants' Br., at 32-41, *Vieth v. Jubelirer* (No. 02-1580) (articulating the proposed "majoritarian" standard). However one resolves the apparent tension, it strains credulity to maintain that desiring to

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basis for the Legislature to follow the good-faith legal advice given by the state officer constitutionally charged with rendering such advice.

remedy a longstanding antimajoritarian map is, in and of itself, irrational.[57]

### iii. The district court found as a factual matter that, in drawing the map, the Legislature had a host of nonpartisan purposes.

Both of the preceding purposes relate to the decision whether or not to draw the map. But the decision to draw the map is not the most relevant question. Appellants' *Vieth* claims sound in Equal Protection, and Equal Protection claims depend upon the *classifications* being made by government. The decision whether or not to redistrict classified nobody; rather, the lines on the map are the only classifications. Hence, in every political-gerrymandering claim the Court has considered, the focus has been on the *map* itself, not on the decision to create the map in the first place.

And, at that level of granularity, Appellants have not even attempted to put forth an argument that every district line was motivated "solely" by partisan gain. For good reason: on this record, the district court easily found that the State's plan was substantially motivated by factors in the legislative give-and-take entirely distinct from partisan politics. Although the then-governing law did not require the district court to search for such reasons, it found and described many of them in its initial pre-*Vieth* decision. *See, e.g.*, J.S., at 86a (witness "credibly testified as to the various political considerations that combined to result in the lines of current . . . District 26"); J.S., at 86a n.61 (State Representative "would not support any plan" if it split the City of Arlington); J.S., at 87a ("Representative Lewis wanted his district to fall completely within one congressional district."); J.S. App., at 87a ("Representative Phil King . . . wanted Parker and

[57] As the district court noted in response to Appellants' argument that legislatures may not consider political fairness in deciding to redistrict, "saying it is irrational, even saying it many times, does not make it so." J.S., at 25a-26a.

Wise Counties to be included completely in Congresswoman Granger's District 12."); J.S., at 88a n.65 ("'[W]e tried to . . . maintain the city limit lines for Ft. Worth and for Arlington. . . . And generally, you had that level of politics going on in every county. . . .'" (quoting testimony of Representative King)); J.S., at 159a (noting that the decision to locate part of Hays County in District 28 "resulted from the Legislature's desire to keep Texas State University . . . out of District 21, which contains the University of Texas at Austin").[58]

And this give-and-take was not simply between and among Republicans; a significant number of requests made by Democrats were honored in the drawing of Plan 1374C. African-American Democratic Representative Glenn Lewis requested that his Texas House District be kept whole, and the leadership in the Texas House committed to honoring that request. *See* Tr. 12/18/03 AM, at 78:1-9 (Bob Davis); J.A., at 282. Thus legislative district 95 was placed in Congressional District 26. *See* Tr. 12/18/03 AM, at 76:23-77:4 (Bob Davis). At the request of Hispanic Democratic Senator Hinojosa, the cities of Mission and Edinburg were kept whole. *See* Tr. 12/18/03 AM, at 89:2-16 (Bob Davis). Likewise, the southern Dallas suburbs of DeSoto and Lancaster were added into District 30, Congresswoman Eddie Bernice Johnson's district. *See* Tr. 12/18/03 AM, at 120:8-14 (Bob Davis). And African-American Democratic Representative Ron Wilson's legislative district was kept whole and placed in Congressional District 9, the new Houston-area African-American opportunity district. *See* Tr. 12/18/03 PM, at 68:10-12 (Rep. Wilson).

Such local and community interests suffused the drawing of the map. They are the essence of the legislative

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[58] These detailed references in the district court's initial opinion also belie Appellants' startling suggestion that, on remand, the district court "contradict[ed its] own prior description of the 2001 court-drawn plan." Jackson Br., at 13. To the contrary, the court well understood its own findings, and it is Appellants who attempt to stretch the court's initial findings beyond what they will bear. *See, e.g.*, J.S., at 15a n.38.

process, and they are more than sufficient to refute Appellants' counter-factual assertion that partisan gain was the only purpose of the Legislature.[59]

### C. Under Any Metric, Plan 1374C Is Substantively More Fair Than Its Predecessor Plan.

In *Vieth*, the Court held that until plaintiffs can demonstrate the emergence of a "substantive definition of fairness" that "command[s] general assent," neither this Court nor any other court will be able to determine whether the use of political classifications in a districting plan has had an impermissible effect on a political group's representational rights. 541 U.S., 306-07 (Kennedy, J., concurring).[60] That is, until courts have "available a manageable standard by which to measure the *effect* of the apportionment," partisan-gerrymandering claims cannot be adjudicated. *Id.*, at 315 (emphasis added). This is true even if – as in *Vieth* – the Court must assume that the new district lines were drawn with a "solely" partisan intent. *See id.*, at 273 (plurality opinion).

Given the Court's explicit charge, Appellants' failure to offer any substantive metric by which to measure the challenged map's effect on their representational rights entirely forecloses any claim, whether based on equal protection principles or the First Amendment, that the map has impermissibly burdened those rights. *See id.*, at 314-15 (Kennedy,

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[59] And, at the end of the day, that two Democrats – African-American Representative Wilson and Hispanic Representative Vilma Luna – both voted *for* the State's plan, which would be incomprehensible if, as Appellants suggest, the State's plan was "inexplicable by anything but animus toward" Democrats. *See* Jackson Br., at 20.

[60] Because Justice Kennedy concurred in the judgment in *Vieth* on grounds more narrow than the plurality, those grounds were properly applied by the district court as the Court's holding. *See Marks v. United States*, 430 U.S. 188, 194 (1977) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.") (internal quotations omitted).

J., concurring); J.S., at 1a. On the need for such a standard, both the plurality and Justice Kennedy agreed.

The divergence between Justice Kennedy and the plurality was one of temperament, not reasoning. While the plurality would hold that political-gerrymandering claims are inherently nonjusticiable, Justice Kennedy preferred to "err on the side of caution" by allowing for the possibility of federal court intervention at some future time should a consensus eventually emerge on "suitable standards with which to measure the burden a gerrymander imposes on representational rights." *Id.*, at 313 (Kennedy, J., concurring). There may come a time when the Court will need to revisit its holding in *Vieth* – after substantive measures of political fairness have developed in the lower courts, or after the passage of time has demonstrated that no such standards are forthcoming. *See id.*, at 311 (Kennedy, J., concurring) (noting that a manageable standard might "emerge in the future"). That time is not now; the ink is barely dry on *Vieth*, and no such consensus can be said to have emerged.

**1. Appellants failed to offer any substantive definition of fairness or show any impermissible political effect.**

As the three-judge district court unanimously found, "[w]e conclude that the claims of excessive partisanship before us suffer from a *lack of any measure of substantive fairness.*" J.S., at 1a (emphasis added); *see also id.*, at 26a (noting Appellants' "inability to articulate a measure of substantive fairness"). On appeal, neither the LULAC nor the Travis County Appellants propose any clear standard, manageable or otherwise, by which to determine whether the State's map is unfair. *See generally* LULAC Br., at 15-25; Travis County Br., at 14-30. And the Jackson Appellants affirmatively celebrate their refusal to show that the map has had or will have an impermissible effect. *See* Jackson Br., at 17 (highlighting the fact that they do not challenge "the *effects* of the district lines" (emphasis added)); *id.*, at 22

(asserting that their claim "*does not turn on* analysis of the *exact effects* of the map" (emphasis added)).[61]

Appellants are certainly correct that abandoning the search for a manageable standard to measure impermissible political effects would "alleviate[] the justiciability concerns expressed in *Vieth*" by relieving the Court of the difficult task "of identifying maps that 'go too far.'" Jackson Br., at 17, 22. But their argument that a partisan-gerrymandering claim can be made out on a showing of intent alone is not an argument under *Vieth* – it is an argument to ignore *Vieth*, as well as *Bandemer* before it. *See, e.g., Bandemer*, 478 U.S., at 139 (plurality opinion) ("[E]ven if a state legislature redistricts with the specific intention of disadvantaging one political party's election prospects, . . . there has [not] been an unconstitutional discrimination against members of that party unless the redistricting does in fact disadvantage it at the polls.").

Appellants' lead counsel was unequivocal – and unquestionably correct – when he told the Court considering the *Vieth* appeal that "[b]y themselves, bad intent and bizarre district shapes can *never* make out a valid claim of partisan gerrymandering." Appellants' Br., at 34, *Vieth v. Jubelirer* (No. 02-1580) (emphasis added).

The reason Appellants appear reluctant to acknowledge their burden to prove that the State's map has a politically unfair *effect* is likely related to the quite impossible task they face in this case of proposing "an agreed upon model of fair and effective representation," *see Vieth*, 541 U.S., at 307 (Kennedy, J., concurring), that would mark the court-drawn, *antimajoritarian* plan – the one they prefer – as more "fair

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[61] The briefs of Frenchie Henderson and Charles Soechting, filed in support of Appellants, also straightforwardly concede that they make no attempt to propose a substantive fairness measure. *See* Henderson Br., at 2 (noting that the "arguments here, as below, avoid the 'how much is too much' partisanship problem"); Soechting Br., at 12-13 (conceding Appellants' lack of a substantial definition of fairness as "undeniably true," but encouraging the Court to avoid the "temptation" of trying to measure partisan-gerrymandering claims "from [a normative] standard of objective fairness").

and effective" than the *majoritarian*, roughly proportional State-drawn plan they challenge, *see* J.S., at 12a-13a.

Nevertheless, whether a partisan-gerrymandering claim is framed under the Fourteenth or the First Amendment, *Vieth* requires a substantive definition of fairness by which to determine whether the challenged plan has impermissibly burdened Appellants' representational rights.

**a. Demonstration of an impermissible effect is necessary to any partisan-gerrymandering claim under the Fourteenth Amendment.**

Appellants' argument that a sufficient showing of partisan intent can alone suffice to establish an equal protection violation reflects their assumption that political classifications are inherently invidious. *See, e.g.*, Jackson Br., at 20 (analogizing map taking political affiliation into account with a law "inexplicable by anything but animus toward the class it affects"). But political classifications are not inherently invidious. *See Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("The reality is that districting inevitably has and is intended to have substantial political consequences."); *id.* ("Politics and political considerations are inseparable from districting and apportionment.").

Politics is an inherent part of redistricting – it would be "'quixotic'" to believe otherwise. *Id.*, at 285 (plurality opinion) (quoting Appellants' Br., at 3, *Vieth v. Jubelirer* (No. 02-1580)). The Framers understood full well that by committing redistricting decisions primarily to elected legislatures, political considerations would play a central role. "The Constitution clearly contemplates districting by political entities . . . and unsurprisingly that turns out to be root-and-branch a matter of politics." *Id.*; *see also id.*, at 307 (Kennedy, J., concurring) ("Race is an impermissible classification. . . . Politics is quite a different matter."); *see Miller v. Johnson*, 515 U.S. 900, 914 (1995) ("[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition. . . ."); *Shaw v. Reno*, 509 U.S. 630,

662 (1993) (White, J., dissenting) ("[D]istricting inevitably is the expression of interest group politics . . . .").

As Justice Kennedy explained in his *Vieth* concurrence, because equal-protection analysis "puts its emphasis on the permissibility of an enactment's classifications," it is well-suited to racial-gerrymandering claims, "since classifying by race is almost never permissible." 541 U.S., at 315. That analysis is considerably more complicated in the context of partisan-gerrymandering claims, however, because there "the inquiry is whether a generally permissible classification has been used for an impermissible purpose." *Id. That* question "can only be answered in the affirmative by the subsidiary showing that the classification as applied imposes unlawful burdens." *Id.* In other words, "[t]he use of purely political considerations in drawing district boundaries" is not an "evil" absent a constitutionally cognizable "harm." *Id.*, at 355 (Breyer, J., dissenting); *see also id.*, at 355 (observing that "pure politics often helps to secure constitutionally important democratic objectives").

Appellants' failure to explain how the State's map has imposed a constitutionally cognizable burden on their representational rights thus precludes any partisan-gerrymandering claim under the Fourteenth Amendment.[62]

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[62] As the district court rightly found, although Appellants "invoke the structure of equal protection analysis, they identify no suspect criterion or . . . fundamental interest" impinged by the State's map. J.S., at 2a. Perhaps the closest Appellants come to alleging a felt burden on representational rights is their somewhat vague claim that the State's plan prevented split-ticket Republican-leaning voters in six districts "from continuing to elect the [Democratic] incumbents they prefer." Jackson Br., at 15; *see also id.*, at 8. It is not clear whether Appellants believe the "impinged fundamental interest" here belongs to the Republican-leaning majority in these six districts – in which case Appellants presumably have no standing to vindicate that interest – or to the Democratic minority in these six districts – in which case vindicating that "interest" would mean constitutionalizing incumbency protection. In either case, Appellants' focus on split-ticket voters highlights the danger in assuming that equal-protection principles developed in a racial context can be easily imported into a political context. *See Vieth*, 541 U.S., at 287 (plurality opinion)

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### b. Demonstration of an impermissible effect is also necessary to any partisan-gerrymandering claim under the First Amendment.

Apparently responding to Justice Kennedy's suggestion in *Vieth* that a partisan-gerrymandering claim might someday be made out under the First Amendment, *see* 541 U.S., at 315, Appellants assert that "the use of government power solely to help or hurt a particular political party's or group's voters, based on the content of their speech or beliefs," violates the First Amendment. Jackson Br., at 20. But framing their partisan-gerrymandering claim as a violation of the First rather than the Fourteenth Amendment does not solve the problem posed by *Vieth* – it would still require a substantive metric by which to determine when the government had impermissibly "help[ed] or hurt a particular political party's" voters.[63]

As Justice Kennedy explained, a hypothetical plaintiff's ability to make out a successful partisan-gerrymandering claim under the First Amendment "depends *first* on courts' having available a manageable standard by which to measure the effect of the apportionment and so to conclude that the State did impose a burden or restriction on the rights of a party's voters." *Vieth*, 541 U.S., at 315 (Kennedy, J., concurring) (emphasis added). Because Appellants propose no test by which to measure the political effect of the apportionment

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(noting that "a person's politics is rarely as readily discernible – and *never* as permanently discernable – as a person's race").

[63] It would also, of course, require the Appellants to identify those voters whom the apportionment had unfairly helped or hurt "based on the content of their speech or beliefs." The only voters Appellants identify as having been unfairly impacted by the alleged partisan gerrymander are a number of "heavily Republican" voters who are now "less likely to split their tickets" and vote for Democratic incumbents "based on personal allegiance." Jackson Br., at 8. The allegation that the State's map placed certain voters in districts where they were more likely to vote for candidates based on political philosophy rather than "personal allegiance" hardly seems a firm foundation upon which to construct a novel First Amendment claim.

they challenge, any *Vieth*-based claim that their First Amendment rights were impinged by that apportionment must fail.[64]

### c. Appellants did not show that Plan 1374C is less substantively fair than Plan 1151C.

Before the district court, the State defendants observed that, to prevail under *Vieth*, each Plaintiff must be able to answer two questions:

1) " . . . [W]hat is your judicially administrable test for unconstitutional political gerrymandering?

2) How does that test demonstrate that the specific district lines under Plan 1151C are more politically 'fair' than the lines under Plan 1374C?" State Defendants' Response Br. on Remand, at 8.

After extended argument before the district court, and hundreds of pages of briefing before this Court, Appellants still cannot answer either question.

Appellants have good reason to shy from proposing a substantive definition of fairness by which to judge the effects of the map they prefer against the effects of the map they challenge. Notably, in *Vieth*, Appellants' lead counsel did offer a standard: he proposed that a map would be judged impermissibly unfair "only when it prevents a majority of the electorate from electing a majority of representatives." 541

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[64] There is some question as to whether the First Amendment is an appropriate vehicle for partisan-gerrymandering claims at all. As the *Vieth* plurality cautioned, "[o]nly an equal protection claim is before us in the present case – perhaps for the very good reason that a First Amendment claim, if it were sustained, would render unlawful *all* consideration of political affiliation in redistricting, just as it renders unlawful *all* consideration of political affiliation in hiring for non-policy-level government jobs." 541 U.S., at 294. This would be problematic, of course, because it has long been taken for granted that "[p]olitics and political considerations are inseparable from districting and apportionment." *Gaffney*, 412 U.S., at 753.

U.S., at 287 (plurality opinion). Though the Court rightly rejected this "majoritarian" test as little more than a proportional-representation requirement in finer dress, *see id.*, at 288; *id.*, at 308 (Kennedy, J., concurring), it nevertheless acknowledged that the proposed standard reflected "the best that [could] be derived from 18 years of experience," *id.*, at 284 (plurality opinion).

Appellants in the instant case do not offer that test, because under *that* measure, it is Appellants' preferred Plan 1151C that is substantively unfair, not the Legislature's Plan 1374C. As the district court explained, under the plan drawn in 1991,

> "Democrats won twenty-one congressional seats in the 1992 election compared to nine won by the Republicans, even though the 'tipping-point' had been reached with the Democratic and Republican parties capturing an equal share of the vote in statewide races." J.S., at 12a.

And although Republican voting strength continued to grow throughout the 1990's, "with the 1991 Democratic Party gerrymander still in place, Democrats captured seventeen congressional seats to the Republicans' thirteen in the 2000 election, despite Republicans garnering 59% of the vote in statewide elections to the Democrats 40%." J.S., at 12a.

Because the map drawn by the district court in 2001 – the map that Appellants urge this Court to reinstate – by design changed as little of the 1991 map as possible, in the words of the district court: "The map drawn by this court in 2001 *perpetuated much of this gerrymander*." J.S., at 21a (emphasis added); *see also id.*, at 12a-13a ("[T]he plan produced by this court *perpetuated much of the 1991 Democratic Party gerrymander*." (emphasis added)).[65]

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[65] In an attempt to get around this factual finding, Appellants advance the rather odd notion that the three-judge court erred (and presumably, was clearly erroneous) in describing *its own map-drawing methodology*. *See* Jackson Br., at 28. Surely, the district court could accurately recount its own methodology; and, in any event, its finding

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Thus, even though Democrats garnered only 41% of the statewide vote in 2002, they retained a majority of the congressional delegation of seventeen Democrats and fifteen Republicans. J.S., at 42a.

As the district court's chart illustrates, J.S., at 42a, from 1992 to 2002 Democrats never once won a majority of the statewide vote, and yet the extant maps ensured the continued reelection of a Democratic majority in the congressional delegation. Indeed, since 1996, Republicans in Texas have never garnered less than 55% of the statewide vote (and Democrats never more than 44%), and yet the prior maps consistently ensured a Democratic majority.

The differential is all the more noteworthy given the traditional "seat-vote" curve; under standard political science methodology, a party garnering 55% to 59% of the statewide vote (as did Republicans in Texas between 1996 and 2002) would be expected to receive a substantially higher percentage – on the order of 65% to 75% – of the total seats. *See generally* Alan Heslop *Amicus* Br. Despite an expected yield of 65% to 75%, in actual practice Plan 1151C yielded only 47% of the congressional delegation as Republicans – nearly 20 points below what one would expect based on the consistent expressed will of the voters.

The antimajoritarian effect of Plan 1151C was at least comparable to if not significantly worse than that present in the plan challenged in *Vieth*. As the *Vieth* Appellants argued,

> "[i]n the five most recent statewide races combined, Democrats had averaged 50.1% of the major-party vote, and in the most recent congressional elections (in November 2000) they had garnered 50.6% of the major-party votes cast across the State." Appellants' Br., at 43, *Vieth v. Jubelirer* (No. 02-1580).

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that Plan 1151 "perpetuated" the effects of the prior map was demonstrably correct: of the 28 incumbents who ran for reelection in 2002, all 28 were reelected. *See* Election Returns Database, *supra* note 3.

Thus, the *Vieth* Appellants urged that preventing a very slight majority of the statewide vote – 50.1% – from electing a majority of the congressional delegation violated the Constitution. Plan 1151C, in contrast, prevented a much more substantial majority – 57% – from electing a majority of the delegation. Under the argument advanced by lead counsel in *Vieth*, Plan 1151C should fail all the more so.[66]

But, of course, the Court rejected that argument in *Vieth*. Hence, under *Vieth*, even a decidedly antimajoritarian map cannot be struck down as an unconstitutional gerrymander. *A fortiori*, a map that is pro-majoritarian cannot be.

As the district court observed, "the plan passed by the Texas legislature resulted in the election of twenty-one Republicans and eleven Democrats to the House of Representatives in 2004, when the Republican Party carried 58% of the vote in statewide races and the Democratic Party carried 41% of the vote."[67] J.S., at 13a. Thus, while Appellants' preferred plan resulted in an antimajoritarian congressional delegation, the State's plan has generated not only a majoritarian delegation, but also a roughly proportional one.

That is not to suggest that majoritarianism or proportionality are realistic candidates for the consensus-garnering substantive measure of fairness that may someday permit these claims to be adjudicated. But given that they represent "the best that [could] be derived from 18 years of experience," *Vieth*, 541 U.S., at 284 (plurality

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[66] For the same reason, Plan 1151C would presumably fail Justice Breyer's "entrenchment" test, whereas Plan 1374C would easily pass it. *Vieth*, 541 U.S., at 360 (Breyer, J., dissenting) (describing his proposed test that would find unconstitutional "the unjustified use of political factors to entrench a minority in power").

[67] As the district court recognized, these ratios compare favorably with the results in Texas "when the statewide voting strength was roughly reversed in 1982," and the Democrats "took twenty-two congressional seats to the Republicans' five." J.S., at 13a n.35.

opinion), it is significant that it is Appellants' preferred plan, and not the State's, that those tests would condemn.

As Justice White explained in *Gaffney v. Cummings*,

> "judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength. . . . [We do not] have a constitutional warrant to invalidate a state plan, otherwise within tolerable limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State." 412 U.S., at 754.

Because Appellants offer no substantive principle by which to judge between the political fairness of the maps in question – and there is no coherent metric of fairness that could yield a conclusion that Plan 1151C is more fair than Plan 1374C – the Court should not accede to Appellants' request to order the replacement of the Legislature's map with a map that is demonstrably less fair and less reflective of the will of the voters.

**2. *Amici* offer no viable substantive definition of fairness that might help Appellants.**

Some of Appellants' *amici* are more forthcoming than Appellants themselves concerning the necessity of finding a fairness measure by which to determine whether a map has an impermissible political effect. *See, e.g.*, Brennan Center for Justice *Amicus* Br., at 22 (stating that, once an impermissible intent has been established, "the question, then, is whether there are judicially manageable standards for gauging the re-redistricting's effect"). Others suggest that the search is doomed from the start. *See, e.g.*, Center for American Progress *Amicus* Br., at 13 ("The notion that there is such a thing as a fairly 'balanced' map that accurately reflects statewide voting patterns is illusory."). But in the hundreds of pages filed by Appellants' *amici*, there is only one even arguably clear proposal

of a candidate for a substantive definition of fairness – the "symmetry standard" – and one other that might possibly be characterized as such – the "competitive district ideal." Neither proposal is of any help to Appellants.

**a. The "symmetry standard" is not viable, and in any event is of no aid to Appellants.**

Professors King, Grofman, Gelman, and Katz offer an *amicus* brief, in support of neither party, urging the Court to consider adopting the "symmetry standard" as defining partisan fairness. King *Amicus* Br., at 3. As the *amici* describe their measure, it "compares how similarly-situated political groups would fare hypothetically if they each (in turn) receive the same given percentage of the vote." *Id.*, at 2-3. Thus, as its name suggests, the symmetry standard is yet another version of a proportionality rule. But instead of comparing the proportion of one party's actual votes to that party's actual seats, it compares the proportion of one party's actual votes and seats to another party's hypothetical votes and seats. Although the symmetry standard is thus subject to the same weaknesses that caused the Court to reject proportionality as the constitutional measure of political fairness, *see Vieth*, 541 U.S., at 288 (plurality opinion); *id.*, at 352 n.7 (Ginsburg, J., dissenting), it lacks the proportionality standard's greatest strengths – clarity and concrete application.

Further, *amici*'s description of the "[t]hree potential approaches" to implementing the symmetry standard confirms that it does not provide a normative measure of fairness, but rather assumes away the question. According to *amici*, the standard can be designed as "(1) a rule that creates as little partisan bias as possible; (2) a rule that prevents a party from gaining a seat to which it otherwise would not be entitled; or (3) a rule prohibiting egregious gerrymanders that show a bias over a certain percentage." King *Amicus* Br., at 3. Those questions, of course, restate the fundamental quandaries that left the Court in *Vieth* searching for a substantive measure of fairness: how much partisan bias is acceptable, to which seats is a party

"entitled," and at what percentage does partisan bias become "egregious"?

Nor does this arbitrary standard – designed to address only the rare if not unprecedented situation of an electorate shifting near instantaneously from a majority (of 58% or more) of one party to a comparable majority of another – account for the heterogeneous distribution of population and political preference. Thus, adopting an overall goal of "symmetry" would require constructing maps that take no real account of other, more traditionally meaningful redistricting values.

**b. The "competitive district" standard is not viable, and in any event is of no aid to Appellants.**

Another set of professors – Issacharoff, Neuborne, and Pildes – suggests that the central principle at issue in these claims is the "competitive integrity of congressional elections." *See* Issacharoff *Amicus* Br., at 14; *see also* Reform Institute *Amicus* Br., at 19. Although they are careful not to assert that their principle is the substantive definition of fairness missing in *Vieth*, *see* Issacharoff *Amicus* Br., at 14, the professors suggest that partisan gerrymanders can and should be judged by the resulting competitiveness of the districts drawn. These arguments are similar to arguments before the Court in *Vieth*, *see, e.g.*, Reform Institute *Amicus* Br., at 18, *Vieth v. Jubelirer* (No. 02-1580), and are precluded by its holding. *See Vieth*, 541 U.S., at 308 (Kennedy, J., concurring).

As an initial matter, the district court carefully considered Appellants' argument on remand that "the districts under the 2003 Texas plan are non-competitive as a result of partisan gerrymandering." J.S., at 29a-30a. The court flatly rejected that contention: "their argument and evidence assumes, but does not show, a necessary or actual correlation between partisan line drawing and an increase in the number of non-competitive Texas congressional districts," J.S., at 29a-30a. To the contrary, the district court expressly found that the relative competitiveness of districts in Texas had fluctuated little for forty-five years,

*see* J.S., at 2a, and that the State's plan had "effected little change in the number of competitive districts," J.S., at 31a.[68] To the extent that noncompetitive districts present structural challenges, those challenges cannot be traced to the State's decision in 2003 to replace the court-drawn redistricting map.[69]

More fundamentally, whatever the normative merits of a standard that would require Republicans and Democrats to be distributed relatively evenly into "competitive districts,"[70] such a standard would likely be judicially unmanageable. Consider a hypothetical application of the standard in a State like Texas, where the Republican-Democrat split approaches 60%-40%. If each district were drawn to look like the State as a whole, no district would be competitive. Thus, to create "competitive" districts to satisfy the theoretical model, many Republicans would need to be "packed" into other arbitrarily less competitive districts. Deciding which Republicans to pack, and where, would necessarily involve inherently political calculations

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[68] Indeed, the district court squarely found, "[t]he Texas plan is not more partisan in motivation or result, *including the impact on the number of competitive districts*, than the Pennsylvania plan upheld in *Vieth*." J.S., at 31a (emphasis added).

[69] The professors note that redistricting can have the effect of disrupting entrenched incumbents so as to create more competitive elections. *See* Issacharoff *Amicus* Br., at 17 (distinguishing between elections that follow the mass wave of district changes each decade). That demonstrates, if anything, the real reason that Plan 1374C resulted in such a shift in Texas's congressional delegation. The district court's plan had been drawn to protect incumbent relationships, with special attention to senior members. J.S., at 208a. As a result, all 28 Texas incumbents won in 2002. *See* J.S., at 85; *see also* Election Returns Database, *supra* note 3. But after redistricting in 2003, Texas voters ousted many incumbents in 2004. If the value is in ensuring accountability to the voters, wholesale changes in district lines may be more salve than bane.

[70] *See, e.g., Vieth*, 541 U.S., at 288 n.9 (plurality opinion) (noting that "the Constitution does not answer the question whether it is better for Democratic voters to have their State's congressional delegation include 10 wishy-washy Democrats (because Democratic voters are 'effectively' distributed so as to constitute bare majorities in many districts), or 5 hardcore Democrats (because Democratic voters are tightly packed in a few districts)").

– should the voters in one region of the State be "packed" so that voters in another area could be blessed with a "competitive" district suitable to the theoreticians? – and the "competitive district" ideal, in itself, would provide no help to a court seeking a well-accepted measure by which to judge or, in the legislature's stead, to *make* those inherently political decisions.

## II. APPELLANTS' CHALLENGES TO SO-CALLED "MID-DECADE" REDISTRICTING ARE INCONSISTENT WITH THE TEXT OF THE CONSTITUTION, WITH THE STRUCTURAL ROLES OF LEGISLATURES AND THE JUDICIARY, AND WITH DECADES OF PRECEDENT.

At trial, several plaintiffs advanced a "pure" mid-decade redistricting argument, namely that Article I of the Constitution prohibited redistricting at any time other than after a decennial census. The three-judge court unanimously and categorically rejected that claim. J.S., at 61a ("Plaintiffs ultimately fail to provide any authority – constitutional, statutory, or judicial – demonstrating that mid-decade redistricting is forbidden in Texas."); J.S., at 171a (Ward, J., concurring in part and dissenting in part) ("I join the court's opinion that the law does not preclude the State's Legislature from enacting a mid-decade redistricting plan . . . ."). None of the Appellants in these consolidated appeals advances that claim.

Instead, Appellants advance two new "hybrid" claims. First, Appellants argue that, even if they cannot prove up a claim of partisan gerrymandering, allegations of "sole" partisan intent – in combination with redistricting mid-decade – should suffice collectively to render the map unconstitutional. Second, they argue that even if mid-decade redistricting is not forbidden directly by the Constitution, it is barred implicitly by the derivative application of the Court's one-person one-vote doctrine. Neither argument has merit.

### A. This Is *Not* Mid-Decade Redistricting.

At the outset, it bears emphasis that the facts in this case do not present "mid-decade" redistricting, if that term is understood to mean redistricting more than once in a

decade. The last time the Texas Legislature redistricted was 1991. Twelve years and a decennial census ensued, and the Legislature did not again redistrict until 2003. Thus, the policy specter to which Appellants point, of legislatures coming back year-after-year, adjusting the congressional lines over and over again after every election, is simply not presented in this case.

Moreover, there is reason to be skeptical that such an outcome is likely. Appellants have pointed to no nationwide outbreak of serial redistricting. Redistricting inevitably causes political strife and division; because it often devolves into a zero-sum political battle, it is necessarily a painful process for legislatures to undergo. Accordingly, legislatures are typically reluctant to dive back into the waters of redistricting. Before *Reynolds v. Sims*, many States had resisted redistricting for decades in order not to disturb the status quo. 377 U.S. 533, 569-70, 583-84 (1964); *see also id.*, at 588-89 & nn.1-2 (Harlan, J., dissenting). Indeed, were it not for the dramatic imbalance between the current voting trends in Texas and the twelve-year-old gerrymander that ensured Democratic control of the congressional delegation – were it not for the large numbers of congressional seats in the balance because of the preexisting map – it is doubtful that the Texas Legislature would have chosen to undertake this effort.[71]

### B. The Constitution Does Not Prohibit A State Legislature From Replacing A Court-Drawn Map. To The Contrary, It Places Primary Districting Responsibility In The State Legislatures.

Even if this case did present an instance of "mid-decade" redistricting, there would be no constitutional prohibition to a legislature's making that policy choice. Although Appellants have now abandoned their pure

[71] Thus, the strongest incentive to redistrict is present precisely when one would in theory find it most desirable to have the map redrawn – when the democratic processes and the consistent will of the people are being systematically frustrated.

challenge to mid-decade redistricting, it is worth surveying briefly why they have done so. Indeed, a full understanding of the clear constitutional authority for state legislatures to act in this arena substantially informs – and undercuts – Appellants' current efforts to eliminate that authority through back-door hybrid theories.

### 1. The Elections Clause authorizes state legislatures to draw district lines except as Congress might dictate otherwise.

The Constitution assigns responsibility for drawing congressional districts to the political branches of the state and federal governments, with the primary responsibility in state legislatures. The Elections Clause delegates the full measure of that power, subject to congressional regulation:

> "The Times, Places and Manner of holding Elections for Senators and Representatives, *shall be prescribed in each State by the Legislature thereof*; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators." U.S. CONST. art. I, §4, cl. 1 (emphasis added).

The Elections Clause thus delegates to States the power to draw congressional district lines. *See Smiley v. Holm*, 285 U.S. 355, 366-67 (1932) (evaluating redistricting power through Article I, §4); *State ex rel. Davis v. Hildebrandt*, 241 U.S. 565, 569 (1916) (same). The words used in the Elections Clause – "Times, Places, and Manner of holding Elections" are "comprehensive words embrac[ing] authority to provide a complete code for congressional elections," subject to Congress's power also to enact laws regulating the same subject matter. *Smiley*, 285 U.S., at 366-67.

The Constitution thus "leaves with the States *primary responsibility* for apportionment of their federal congressional . . . districts." *Growe v. Emison*, 507 U.S. 25, 34 (1993) (emphasis added); *see also Branch v. Smith*, 538 U.S. 254, 261 (2003) ("[Redistricting] is primarily the duty and responsibility of the State through its legislature."); *White v. Weiser*, 412 U.S. 783, 795 (1973) ("[S]tate legislatures have 'primary jurisdiction' over legislative reapportionment.").

Although that power is vested primarily in state legislatures, Congress is tasked with oversight. The balance created by this structure – state legislatures' having the primary role unless supplanted by congressional enactment – was explained by Alexander Hamilton in the Federalist Papers: giving the States primary authority obviated the need to specify all the details in the Constitution itself because it created and assigned "a discretionary power over elections." THE FEDERALIST No. 59 (A. Hamilton). The method "with reason . . . preferred by the convention" was to give power "primarily" to the state legislatures but with "ultimat[e]" oversight by Congress. *Id.*

Congress has actively engaged in its oversight responsibilities: it has required the drawing of single-member congressional districts, established a uniform election day for congressional seats, and required that congressional elections use written or printed ballots. *See* 2 U.S.C. §§2c, 7, 9. Congress has not, however, regulated *when* a state legislature may draw congressional districts. And it most certainly has not barred state legislatures from doing what Texas did here – replacing a court-drawn remedial plan with a legislative plan embodying those policy preferences that courts are not institutionally able to consider.

As the district court observed in its January 6, 2004, opinion, complaints concerning a state legislature's decision to redraw a court-drawn districting plan are properly directed, under our constitutional system, to Congress, not the courts. J.S., at 80a ("[T]hese arguments . . . are directed to the wrong forum."). If a party wishes to affect the balance provided by the Elections Clause – under which the "primary responsibility" remains with the States, *Growe*, 507 U.S., at 34 – it should seek a statute pursuant to Congress's regulatory authority under Article I, §4.

**2. The Court has for decades based its redistricting cases on the premise that state legislatures may redraw a court-imposed map in order to express their policy preferences.**

Recognizing that the Constitution firmly vests redistricting power in the political branches, the Court has

provided that federal courts must exercise restraint in crafting their own remedial plans, which are to focus on remedying specific violations of federal law while otherwise respecting state policy preferences. *See Upham v. Seamon*, 456 U.S. 37, 41-42 (1982) (per curiam). In so limiting the role of federal courts, this Court and others have repeatedly recognized that state legislatures retain the power to redraw those court-ordered remedial plans to better express their own policy preferences.

When the Court has confronted situations involving remedial plans, it has often explicitly stated that the state legislature remains free to enact a new plan that better addresses its policy preferences. *See, e.g., Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) ("[I]t becomes the 'unwelcome obligation' . . . of the federal Court to devise and impose a reapportionment plan *pending later legislative action.*") (emphasis added); *Connor v. Finch*, 431 U.S. 407, 414-15 (1977); *Burns v. Richardson*, 384 U.S. 73, 85 (1966) ("The *State remains free to adopt other plans* for apportionment, and the present interim plan will remain in effect for no longer than is necessary to adopt a permanent plan.") (emphasis added).

Lower courts have consistently followed that guidance. For example, the district court in *White v. Weiser*, 412 U.S. 783 (1973), indicated that its remedial plan was without prejudice to consideration and adoption of any new plan by the Legislature before the next census. *Id.*, at 789. The Court's subsequent holding that the district court's plan was insufficiently deferential, *id.*, at 795-97, underscores how critical it is to allow a state legislature the full opportunity to replace a court-ordered plan.

In *Johnson v. Miller*, later affirmed by this Court, the district court implemented a remedial plan in the fifth year of a decade, expressly noting that the state legislature was free to replace it with one that better fit the State's policy preferences even before the next census. 922 F.Supp. 1556, 1569 (S.D. Ga. 1995) ("We do no harm with this plan, which cures the unconstitutionality of the former and can serve in 'caretaker' status until the legislature convenes to

change it. *That may occur following the millennium census, or before.*" (emphasis added)), *aff'd sub nom. Abrams v. Johnson*, 521 U.S. 74 (1997).

And in *Bush v. Vera*, the district court explicitly observed that the Texas Legislature remained free to replace the court's plan with its own. After the Court affirmed the district court's original finding that three of the districts in the State's existing plan were unconstitutional, *Bush v. Vera*, 517 U.S. 952, 986 (1996), and after the Governor decided not to call a special session of the Legislature to attempt to enact a plan of the State's choosing, the district court implemented a remedial plan in the sixth year of the decade. *Vera v. Bush*, 933 F.Supp. 1341, 1344, 1352 (S.D. Tex. 1996). The court explained that the State would nonetheless remain able to enact a replacement plan to better fit its political preferences: "[Texas Lieutenant Governor] Bullock and [House Speaker] Laney contend that the Texas Legislature is ready and willing to redistrict during its 1997 regular session. Of course, in any event, *they will have that opportunity* as this Court's remedy is an interim plan . . . ." *Id.*, at 1346 (emphasis added).[72]

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[72] In a remarkable parallel, the Court has already considered whether a State may "voluntarily" redraw a court-ordered map in a decade's third year. After the 1980 Census, Texas was awarded two additional congressional seats. *Upham v. Seamon*, 456 U.S. 37, 38 (1982) (per curiam). In 1981, the Texas Legislature enacted a congressional map that failed preclearance. *Id.* A federal district court drew a remedial plan, which was appealed to this Court. *Id.*, at 40-41. The Court held that the lower court had not been sufficiently deferential to the State's political choices as expressed in its non-precleared plan, and remanded the case for the district court to determine whether there was sufficient time to replace its map before the 1982 elections. *Id.*, at 44. If not, the Court noted, the lower court's map was in any event "only an interim plan and is *subject to replacement by the legislature in 1983*." *Id.* (emphasis added). On remand, the State urged that the district court's map be used in the 1982 election to minimize disruption, and the court agreed, describing its map as a "temporary interim plan for the 1982 primary and general elections." *Seamon v. Upham*, 536 F.Supp. 1030, 1034-35 (E.D. Tex. 1982) (three-judge court). After the court-drawn map was used in the 1982 elections, the Texas Legislature enacted its own map, better reflecting the State's policy preferences, in 1983. Act of May 30, 1983, 68th Leg., R.S., ch.531, 1983 Tex. Gen. Laws 3086.

(Continued on following page)

And here, the 2001 *Balderas* court that drew Plan 1151C explicitly labeled that plan a "remedial" plan, J.S., at 216a, and affirmatively invited the Legislature to step in and alter it:

> "Various parties urged us to create both African-American and Latino minority districts. These districts are not required by law . . . but could be created by the State as long as race was not a predominant reason for doing so. Whether to do so is, however, a *quintessentially legislative question*, implicating important policy concerns. . . . The matter of creating such a permissive district is *one for the legislature*. . . . [The arguments in favor of additional minority districts] are *directed to the wrong forum*, however much we may personally admire the arguments." J.S., at 209a, 212-13a (emphasis added).

Those arguments were later directed to the "right forum," and the Legislature accepted the *Balderas* court's explicit invitation to choose as a policy matter to adopt a new redistricting plan and to create the two new minority opportunity districts that had been sought in 2001.

### 3. The added gloss of alleged "partisan intent" does not undercut the constitutional delegation of redistricting authority to state legislatures.

Implicitly recognizing that this Court's decisions do not support their arguments (1) that mid-decade redistricting is

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Appellants' various theories ignore at least two lessons of the *Upham* litigation. First, *Upham* demonstrates that a state legislature is permitted to redraw a court-drawn map even after the first election cycle of a decade. Texas did just that in 1983, as it did in 2003. Second, even if a State consents to the use of an interim plan, the Legislature still retains its authority to enact a plan that better fits its policy preferences. In 1981 and 1982, Texas urged both this Court and the district court to use the court-drawn remedial plan in the 1982 elections, and after those elections chose to enact (with the active encouragement of then-Congressman Martin Frost) a new plan in 1983. Appellants offer no reason why Texas could redistrict in 1983 to better implement its policy preferences, but could not do so in 2003.

constitutionally forbidden or (2) that map-drawing with "solely" partisan intent is unconstitutional, Appellants seek to avoid precedent by creating a hybrid theory in which *neither* is categorically barred. Under their proposed test, mid-decade redistricting will be permissible, so long as the Legislature's motive for doing so is mixed or unclear, rather than "for the sole purpose of maximizing partisan advantage." J.S., at i. Likewise, "solely" partisan gerrymandering would be allowed so long as it is conducted in 2001, 2011, 2021, or any other year following a census. Together, however, Appellants urge, the two are impermissible. But the whole is not greater than the sum of its parts, and the fusion of the two theories is no more meritorious than its forebears.

Three Appellants for whom the Court noted probable jurisdiction make the *timing* of Texas's redistricting the centerpiece of their claims.[73] Thus, they explicitly disavow any attack on the *substance* of the map, *see* Part I.C.1, *supra*, presumably because of their inability to marshal a coherent standard under which Plan 1374C would be deemed less fair than Plan 1151C:

> "[Appellants'] challenge does not turn on analysis of the exact effects of the map. Nor does it turn on analysis of the reasons or purposes behind the drawing of any particular lines." Jackson Br., at 22.

Eschewing substance, they are left with timing.[74] But there is no constitutional prohibition on any particular timing, mid-decade or otherwise, when legislatures might choose to redistrict. *See* Part II.B, *supra*. And their entire timing argument is in turn predicated on a concept fundamentally at odds with

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[73] Only the GI Forum Appellants do not make the timing of Texas's redistricting the centerpiece of their arguments.

[74] *See* Jackson Br., at 26 ("Indeed, when legislators redraw lawful districts in mid-decade, courts should presume that action to be purely partisan."); *see also id.*, at 2 ("there was no legal necessity to change the lines"); *id.*, at 17 ("when a lawful map is in place and there is no other legitimate justification for changing the district lines"); *id.*, at 22 ("a challenge to a mid-decade remap needlessly undertaken for solely partisan reasons").

decades of this Court's precedents: that redistricting that is "unnecessary" – that is, not mandated by a court – is for that reason constitutionally suspect.

Appellants invert the constitutional structure. This Court's precedents have never countenanced the notion of "necessary" or "unnecessary" redistricting by a legislature.[75] That is a concept wholly foreign to the Court's jurisprudence. *See Growe*, 507 U.S., at 34; *Branch*, 538 U.S., at 261. Rather, the Court has consistently cabined in *judicial* redistricting to encompass only remedial line-drawing that is legally required. *Weiser*, 412 U.S., at 794-95; *Upham*, 456 U.S., at 41-42. All else, the Court has made clear, is the province of elected legislatures. *See* Part II.B.2, *supra*.

### C. Equal-Population Principles Do Not Prevent a State Legislature from Replacing a Court-Drawn Map Based On 2000 Census Data with Its Own Map Based on 2000 Census Data.

Appellants also advance a series of arguments under the banner of "equal population" or "one-person, one-vote." As an initial matter, it bears emphasis that these claims have little to do with traditional one-person, one-vote claims. Indeed, there is no dispute at all that, under the 2000 census numbers, the districts in Plan 1374C are perfectly equipopulous: each district contains exactly 651,619 or 651,620 persons (and the only reason for the one-person variance is that the total number of Texans, 20,851,820, is not evenly divisible by

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[75] The equal-population claims are also about timing rather than substance, condemning "[t]he state's undertaking of the effort at all" to replace a court-drawn plan with one that better fit the State's policy preferences. Travis County Br., at 19; *see also id.*, at 22 & 29; Jackson Br., at 30 (describing the decision to redistrict as "gratuitous[ ]"); LULAC Br., at 14. Accordingly, Appellants explain that their equal-population theory should apply only to "voluntary" redistricting – attacking whether a State can replace a court-drawn map with one that better fits its policy preferences. Travis County Br., at 11 (applying the rule to "judicially unforced, voluntary redistricting"); *id.*, at 15 ("while under no legal compulsion"); *id.*, at 18 ("doing so when there was no legal compulsion"); *see also* Jackson Br., at 30-31; LULAC Br., at 20.

thirty-two). J.A., at 338. Nor is there any dispute that the 2000 census numbers are the most accurate numbers available; indeed, the plan that Appellants champion, Plan 1151C, uses *exactly the same census numbers*.

Hence, Appellants are not seeking the traditional end of a one-person, one-vote claim: a more accurate count. Instead, they readily concede that no more accurate count is possible. Thus, they candidly admit, this claim is merely a pretext for an outright prohibition on "mid-decade" redistricting.[76]

**1. Appellants failed to discharge their burden of proving that the new districts are not equipopulous.**

The Court has held that, where congressional redistricting plans are challenged on an equal-population basis, plaintiffs "must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld." *Karcher v. Daggett*, 462 U.S. 725, 730-31 (1983). Appellants do not dispute that the State's redistricting map is perfectly equipopulous under the Census Bureau's block-level data released in March 2001.

Appellants instead argue that the State should have used a different set of population data. But Appellants did not prove that any other source of accurate data exists that could be used to draw districts with a smaller population deviation than the State's perfectly equipopulous districts. Nor did Appellants even offer a map based on either of the two conflicting data sources they propose, the limited-purpose Count Question Resolution (CQR) program data or various postcensal population estimates.

These evidentiary failures are fatal to any equal-population claim because of the strong and well-founded

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[76] The Travis County Appellants assert that the district court found their theory to be "a more plausible contention" than some other theories, *see* Travis County Br., at 10, but in fact the court said the theory was "*seemingly* more plausible." J.S., at 2a. (emphasis added).

presumption in favor of using the census enumeration data for redistricting. Even recognizing that decennial census data "measure[] population at only a single instant in time [and] [d]istrict populations are constantly changing, often at different rates in either direction, up or down," *Gaffney v. Cummings*, 412 U.S. 735, 746 (1973), the Court has held that States may rely on the decennial data until replacement data are proven up. This is because "the census data provide the only reliable – albeit less than perfect – indication of the districts 'real' relative population levels . . . [, and] *because the census count represents the 'best population data available,' it is the only basis for good-faith attempts to achieve population equality.*" *Karcher*, 462 U.S., at 738 (emphasis added); *see also Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 344 (1999).

Appellants offered the three-judge court below no alternative map or methodology, instead they simply asserted that the prior court-drawn Plan 1151C must be used. Because both Plan 1151C and 1374C used the identical 2000 census data, Appellants' defense of the former over the latter cannot be understood as a good-faith critique of the data.[77] There is thus no evidence that, if Plan 1151C were used in 2006, it would be any more equipopulous than is Plan 1374C. Consequently, there is no basis to reverse the judgment of the three-judge court rejecting Appellants' claims.

**2. Appellants' one-person, one-vote argument is contrary to this Court's precedent treating census data as presumptively valid.**

Appellants' argument would also require the Court to disregard established precedent. For example, in *Georgia*

[77] Indeed, it is Appellants' rule that, if it were possible to satisfy, could potentially "dilute" the standard of "one-person, one-vote," *cf. Cox v. Larios*, 542 U.S. 947, 949-50 (2004) (Stevens, J., concurring), by replacing the presumption in favor of objective census enumeration data with the requirement of using subjective and varying estimates of population change.

*v. Ashcroft*, the Court expressly approved the legality of using decennial census data throughout the decade:

> "When the decennial census numbers are released, States must redistrict to account for any changes or shifts in population. But *before the new census, States operate under the legal fiction that even 10 years later, the plans are constitutionally apportioned.*" 539 U.S. 461, 488 n.2 (2003) (emphasis added);[78] *see also Karcher*, 462 U.S., at 738 (same).

The Travis County Appellants urge that this "legal fiction" should not apply when a State "voluntarily" redistricts mid-decade. Travis County Br., at 11, 20; *see also* Jackson Br., at 30; LULAC Br., at 13. As the district court observed when the University Professors *amici* made the same argument below, "[t]he argument as presented comes unadorned with supporting case citations." J.S., at 33a. Instead, it is supported by the repeated assertion that "voluntary" (or, in the words of the Jackson Appellants, "unnecessary") redistricting is inherently suspect.[79] No precedent supports that assertion. *See* Part II.B, *supra*.

None of the "one-person, one-vote" precedents suggests that the principle limits *when* during the same decade a State could rely on the relevant census data. Nor

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[78] Indeed, in that 2003 decision, the Court used *thirteen-year-old census data* from 1990 to evaluate a Voting Rights Act challenge, specifically rejecting the dissent's argument that such data were "irrelevant." *Id.*

[79] The version of the "equal population" rule urged by Appellants does not condemn *how* or *where* the State placed the district lines in 2003, but rather "[t]he state's undertaking of the effort at all" to replace a court-drawn plan with one that better fit the State's policy preferences. Travis County Br., at 19; *see also id.*, at 22 & 29; Jackson Br., at 30 (describing the decision to redistrict as "gratuitous[ ]"); LULAC Br., at 14. Accordingly, they suggest that the rule apply only to "voluntary" redistricting – attacking whether a State can replace a court-drawn map with one that better fits its policy preferences. Travis County Br., at 11 (applying the rule to "judicially unforced, voluntary redistricting"); *id.*, at 15 ("while under no legal compulsion"); *id.*, at 18 ("doing so when there was no legal compulsion"); *see also* Jackson Br., at 30-31; LULAC Br., at 14.

do the Court's cases about the proper role of state legislatures in redistricting erect the "one-person, one-vote" principle as a hurdle faced by a state legislature when it sets out to replace a court-imposed plan with a legislatively-crafted one. Yet, Appellants ask the Court to extend the first line of cases to effectively overrule the second. That result is unfounded.

Indeed, the Court has used the decennial census numbers to assess the population equality of a congressional districting plan that was enacted even later in the decade than was the Texas map. In *Kirkpatrick v. Preisler*, the Court reviewed the population equality of a redistricting plan passed in 1967 using the 1960 census data, referring to it as "the best population data available to the legislature in 1967." 394 U.S. 526, 528 (1969).

**3. Appellants' distortion of the "equal population" rule would invert the proper roles of courts and legislatures.**

*Wesberry v. Sanders* requires almost perfect equality between congressional districts. 376 U.S. 1, 7-8 (1964); *see also Karcher*, 462 U.S., at 730. In practice, that high degree of mathematical precision would be almost impossible using any data other than the decennial block-level data. Appellants' rule would thus turn on its head the clear guidance that state legislatures have been delegated primary jurisdiction over redistricting as a constitutional matter. *See Growe*, 507 U.S., at 34; *Upham*, 456 U.S., at 41-42; *Connor*, 431 U.S., at 414-15; *see also Wise*, 437 U.S., at 540 ("[I]t becomes the 'unwelcome obligation' . . . of the federal court to devise and impose a reapportionment plan *pending later legislative action*." (emphasis added)).

Appellants do not attempt to hide the ball with this argument; they readily concede their proposed burden would be impossible to meet. As the district court found,

> "[i]n their briefs and at oral argument, the litigants *conceded that such data do not exist and could not practically be obtained.* The proposed rule is intended to, and would, serve as a means to the end of preventing what Texas did here, to

> redistrict mid-decade to replace a court-imposed plan with one crafted by the legislature." J.S., at 35a (emphasis added).

Thus, although Appellants invoke the rhetoric of "equal population," theirs is yet another complaint about timing, not the substantive equality of district populations.

Tellingly, for this purported "violation," Appellants propose as a "remedy" that the Court order a return to Plan 1151C – the map used in the 2002 Texas congressional elections that was drawn by a federal court in November 2001. Travis County Br., at 30; Jackson Br., at 50. A voter under either map resides in a district drawn according to 2000 census data. J.S., at 37a. If the data have become inaccurate over time, that inaccuracy should equally afflict both maps. There is simply no difference – in terms of *population equality* – between two maps based on when they were drawn.[80]

**4. Unlike in *Cox v. Larios*, there is no evidence whatsoever of deliberate deviations from the equal population rule.**

Appellants rely heavily on the Court's summary affirmance in *Cox v. Larios*, 542 U.S. 947 (2004). But *Larios* is inapposite. First, in *Larios* the State's map was *not* perfectly equal in population based on decennial census data, and thus the plaintiffs were able to demonstrate an actual and avoidable population deviation. *Larios v. Cox*, 300 F.Supp.2d 1320, 1354 (N.D. Ga.) (three-judge court), *aff'd*, 542 U.S. 947 (2004). Because *Larios* dealt with population disparities in *state* legislative districts in Georgia, which are not governed by *Karcher*'s requirement of absolute equipopulosity for congressional

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[80] Although LULAC suggests that Plan 1374C may have had an adverse effect on Hispanic voters because of the relatively faster growth rate of that population, LULAC Br., at 14, the scant evidence it offered – even had that evidence been admitted at trial, *see* Part II.C.6, *infra* – discusses only Plan 1374C and does not prove that Plan 1374C is better or worse in terms of *population equality* than is Plan 1151C, which was drawn with exactly the same data. *See* LULAC Br., at 18-20.

districts, those state-level districts had population variances of up to 10 percent. *Id.*, at 1327. In contrast, Plan 1374C is perfectly equipopulous, and Appellants have failed to show any *avoidable* population disparity. Second, and critically, the evidence in *Larios* demonstrated that those deviations were deliberate and "systematic[]," underpopulating the favored party and overpopulating the disfavored party. *Id.*, at 1329.[81]

In contrast, there is no such evidence in the case at bar. Instead, the Jackson Appellants repeatedly speculate about what "can" or "could occur," Jackson Br., at 31, never once suggesting that it *did* occur here. And, for good reason: there is no evidence whatsoever that the Legislature even considered such issues, much less acted as in *Larios* to take deliberate advantage of any population deviations.

**5. Even nad they brought a conventional "equal population claim," Appellants would have failed to meet their burden.**

When congressional redistricting plans are challenged on an equal-population basis, the plaintiffs "must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme *must be upheld*." *Karcher*, 462 U.S., at 730-31 (emphasis added). Under *Karcher*, Plaintiffs must prove (1) actual "differences" in population equality among the districts that (2) "could have been avoided" by drawing different district lines.[82] Appellants have failed to discharge that burden.

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[81] Notably, the district court in *Larios* had (before the summary affirmance) used the 2000 decennial census data to draw its own remedial districts. 314 F.Supp.2d 1357, 1363-65 (N.D. Ga. 2004). Thus, while Appellants argue that using the 2000 census data is a violation in this case, in *Larios*, close adherence to the same data was the remedy.

[82] Because they cannot show that any *population deviation* was avoidable, Appellants try to change the question to whether the initial decision to engage in redistricting was "avoidable." *E.g.*, Travis County Br., at 19 ("undertaking of the effort at all was transparently avoidable"). But that has nothing to do with population equality.

The *sine qua non* of an equal-population claim is a showing that the districts could, in fact, have been drawn more equally. This, the Appellants have not done. No Appellant has offered an alternative districting plan that would result in any smaller population deviation than Plan 1374C. They have thus failed to discharge their burden, and their claim should be rejected. *Karcher*, 462 U.S., at 730-31; *accord Larios*, 300 F.Supp.2d 1320, 1353 (N.D. Ga.), *aff'd*, 542 U.S. 947 (2004).

On remand, the Travis County Appellants accurately represented to the trial court that – even taking into account the existence of more recent county-level population estimates and "corrections" issued to certain non-block-level census data – "the relevant populations for one person, one vote purposes ... are not discernable." Travis County Br. on Remand, at 12-13 (docket #207). Although Travis County had offered as one of its only two trial exhibits a "Count Question Resolution" report from the Census Bureau, it made clear that "[t]he city and the county do not rely on this corrected census analysis to establish their case."[83] *Id.*, at 6-7 n.2. That was because, as they candidly told the district court, "the hurdle of developing a rigorous and careful new current population basis may be insurmountably high in a factual sense." *Id.* But *Karcher*

[83] The Count Question Resolution (CQR) program data were not meant to be used for redistricting, nor was it a complete enough data set to be used for that purpose. Accordingly, the Census Bureau expressly qualified the release of CQR data with an official statement that "[t]he CQR program is not a mechanism or process to challenge the March 6, 2001, decision of the Secretary of Commerce to release unadjusted numbers from Census 2000 for redistricting purposes." 66 Fed. Reg. 35588-03, 2001 WL 753536 (July 6, 2001) ("The Census Bureau will not change the ... redistricting counts to reflect corrections resulting from the CQR process."). The Texas CQR data do not even cover the entire State, and where the data exist, they exist only at the geographic level of cities and counties – not the block level necessary for congressional redistricting. For this reason, the implication in Travis County's brief that the State should have used "corrected" census numbers, *see* Travis County Br., at 5 & 5n.8, is entirely unfounded.

affirmatively makes it the plaintiff's burden to clear that hurdle, and Appellants have failed to meet it.

Nor could Appellants have shown that any population deviations -- had there been any under the 2000 block-level census data – "were not the result of a good-faith effort to achieve equality" so as to shift any burden at all to the State. *Karcher*, 462 U.S., at 731.

The bulk of the Travis County Appellants' allegations that they label a lack of "good faith" actually concern political shifts, not population equality. *E.g.*, Travis County Br., at 7 (discussing "voting trends," "post-2000 political reality," and "election results and voting trends"); *id.*, at 11 ("up-to-the-minute politics, election results, and the local implications of demographic shifts"). When Travis County does cite snippets of testimony that concern population, the evidence demonstrates at most that individual legislators had a general sense of the broad demographic trends in their districts, not that the State made anything less than a good faith effort to fully equalize populations. *See* Travis County Br., at 7-8. That is far from showing that any population deviations – had Appellants met their burden to show them to be "avoidable," which they did not – resulted from an absence of "good faith" about achieving population equality.

**6. LULAC did not timely assert any equal-population claim, and did not secure the admission into evidence of its expert affidavit, which in any event is facially unreliable.**

LULAC's appeal offers no opportunity to reach any substantive issue related to equal population.[84] LULAC did

[84] LULAC is not a voter who resides in an overpopulated district, and thus lacks standing to assert this claim. *See United States v. Hays*, 515 U.S. 737, 746-47 (1995) (racial gerrymandering); *Larios v. Perdue*, 306 F.Supp.2d 1190, 1209 (N.D. Ga. 2003) (three-judge court) (applying *Hays* to the equal-population rule); *see also* U.S. CONST. art. I, §2 ("by the People of the several States"); *Wesberry*, 376 U.S., at 8.

(Continued on following page)

not make an "equal population" claim of any kind at trial. Instead, it sought to interpose the claim for the first time *after* remand – and even then failed to comply with the district court's scheduling order.[85] At the same time, LULAC filed a motion seeking to supplement the record with exhibits, including "LULAC Remand Exhibit No. 2" – a purported expert affidavit concerning district populations. That motion was also made more than a month *after* the district court's deadline for the supplementation of the record.[86] *See* Order (Oct. 18, 2004) (docket #195). The State immediately filed an objection to the belated amendment of the complaint and this very late and untested evidence that appeared on its face to be unreliable. *See* State Defendants' Opposition to LULAC's Motion to Amend Its Complaint and LULAC's Motion to Supplement the Record (docket #247).

As LULAC admits, the trial court never ruled on its belated motion to supplement the record.[87] *See* LULAC Br.,

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Although LULAC did not attach its notice of appeal to its jurisdictional statement, *but see* SUP. CT. R. 18.3, that document confirms that LULAC is the only appellant and that no individual voters joined its appeal. Notably, the notice of appeal also characterizes "the Plaintiff's claim" as being "that the State violated the Voting Rights Act ... and the Equal Protection Clause" – omitting any mention of equal population.

[85] LULAC filed a belated motion for permission to amend its complaint on January 14, 2005 – the day on which the *second round* of remand briefing was due and only a week before the hearing in the case. *See* Plaintiff's Motion to Amend (docket #239-1); *see also* Order (Oct. 18, 2004) (docket #195).

[86] LULAC's assertion that it "timely filed" this untested expert affidavit, *see* LULAC Br., at 12 n.22, is difficult to explain.

[87] LULAC suggests that the court must have agreed to accept the exhibit because "the district court opinion refers to the submitted exhibits." LULAC Br., at 12 n.22. For that proposition, LULAC cites the specially concurring opinion of Judge Ward, not the opinion of the court. *Id.* And Judge Ward was quite deliberate in *not* referring either to LULAC's belated claims or to LULAC's untimely and improper exhibit. Judge Ward characterized the "one-person, one-vote" arguments as having been "initially presented by the Travis County parties and now urged on remand by the University Professors," J.S., at 45a, not suggesting that LULAC's claim was before the court. And the mention of LULAC in Judge Ward's opinion was *not of its exhibit at all*, but rather recounts a general example given in LULAC's brief without

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at 12 n.22. Since it was never admitted in the district court, it should not have been attached to LULAC's jurisdictional statement or relied upon in their briefing.

But even were this "Remand Exhibit No. 2" properly a part of the record, it could hardly satisfy LULAC's burden of proof. It contains a two-page affidavit of generalities regarding how the decennial census data are out of date, *see* LULAC J.S., at 55a-56a, followed by extensive curricula vitae and a single quantitative table purporting to show district populations for Plan 1374C computed by some undisclosed method,[88] LULAC J.S., at 83a. That table quite literally does not add up, and even if it did, it would say nothing about whether any such population deviation was *avoidable*. That is, LULAC offers no better plan.

None of the Appellants presented any data superior to the legally-binding 2000 census data. They presented nothing whatsoever at the block level – the level required to draw districts satisfying equipopulosity. Nor did they present or advert to any methodology for discerning any such block-level data other than using census data. Indeed, they explicitly admitted such data were impossible to derive. Accordingly, they failed to carry their burden of proof, *see Karcher*, 462 U.S., at 730-31, and the three-judge court properly rejected their claim.

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suggesting that any evidence bolstered that example. J.S., at 50a. At a minimum, Judge Ward's opinion provides no basis to think the district court had granted either of LULAC's motions.

[88] There is no explanation of how LULAC translated county-level census estimates into the very different geographies of congressional districts. Trying to construct congressional districts out of county- and city-level data would be like trying to rearrange the pieces from one enormous statewide jigsaw puzzle into 32 smaller – but perfectly equally sized – district-sized arrangements. For example, several of the larger counties – such as Travis County, Harris County, and Dallas County – are bigger than any single congressional district. These county-level projections say nothing about *which parts* of Dallas County, *which parts* of Harris County, and *which parts* of Travis County had experienced precisely what levels of relative population change.

### D. Adopting Appellants' Theories Would Fundamentally Alter The Constitutional Division Of Authority Between State Legislatures And The Federal Judiciary.

The practical import of adopting any of Appellants' timing-based theories would be to draw a permanent distinction between "necessary" and "unnecessary" redistricting. The primary decisionmaker for redistricting would become the federal courts. Indeed, under Appellants' theories redistricting would be necessary only (1) after a federal court has struck down a map, or (2) after a decennial census, when, under *Wesberry v. Sanders*, a federal court is virtually certain to strike down the old map. Thus, Appellants would make the actual or threatened invalidation by a federal court into the necessary antecedent for any redistricting by a legislature. All other times, redistricting by a legislature would be deemed "unnecessary," "voluntary," or "gratuitous," and hence constitutionally suspect.

Moreover, under Appellants' theories, any time a federal court enacts a map – even a map explicitly labeled as remedial and temporary – the Legislature would be unable to alter that map for the remainder of the decade (because, under Appellants' reasoning, a "legal map" is already extant). Thus, the federal courts would become the "primary" arbiters of redistricting, and the state legislatures would act only when legally "necessary."

There is an *Alice in Wonderland* quality to Appellants' arguments ("up is down, and down is up"), in that they are a precise, symmetrical inversion of the current standards dictated by the text of the Constitution and by this Court's longstanding precedent. As the Court explained in *White v. Weiser*,

> "[f]rom the beginning, we have recognized that '*reapportionment is primarily a matter for legislative consideration* and determination, and that *judicial relief becomes appropriate only when a legislature fails* to reapportion according to federal constitutional requisites in a timely fashion

> after having had an adequate opportunity to do so.' We have adhered to the view that *state legislatures have 'primary jurisdiction'* over legislative reapportionment. . . . In fashioning a reapportionment plan or in choosing among plans, *a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.'*" 412 U.S., at 794-95 (citations omitted) (emphases added); *see also Upham*, 456 U.S., at 41-42 (same).

Appellants' many attempts to ban "mid-decade" redistricting – under either the guise of partisan gerrymandering or the pretext of one-person, one-vote – are altogether incompatible with the text of the Constitution and with decades of unbroken precedent from this Court.

## III. The District Court's Finding That There Was No Vote Dilution Under §2 of the Voting Rights Act Was Not Clearly Erroneous.

To meet his burden of proof in showing vote dilution under §2, a plaintiff must both show that the *Gingles* preconditions are satisfied and show that the totality of the circumstances demonstrates vote dilution. The three preconditions are: "First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986). "Second, the minority group must be able to show that it is politically cohesive." *Id.*, at 51. "Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed . . . usually to defeat the minority's preferred candidate." *Id.* If a plaintiff proves all three preconditions, then the district court must make a finding whether, under the "totality of the circumstances," the political process is equally open to minority voters. *See id.*, at 79; *see also Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994).

After an extensive review and careful weighing of the Appellants' evidence and the live testimony at trial, the

district court found that, on this record, the *Gingles* preconditions were not satisfied, and that the State's redistricting map did not, as a matter of fact, dilute minority voting strength. J.S., at 99a-150a. Under the Court's opinion in *Gingles* and Federal Rule of Civil Procedure 52(a), these findings may not be disturbed unless they are shown to be clearly erroneous. Appellants do not, and cannot, make that showing.

### A. The District Court's Ultimate And Subsidiary Findings Concerning A §2 Vote-Dilution Claim May Not Be Set Aside Unless Clearly Erroneous.

Although these fact-bound §2 claims have been examined in detail and rejected by a three-judge court well-acquainted with Texas's political landscape, Appellants now ask this Court to hold that the district court "erred when it failed to find that the State's redistricting plan violates the Voting Rights Act." GI Forum Br., at 22; *see also* Jackson Br., at 32. Appellants thus invite this Court, in effect, "to duplicate the role of the lower court . . . [and to] weigh[ ] the evidence differently." *See Anderson v. Bessemer City*, 470 U.S. 564, 573-74 (1985). The Court should decline that invitation.

Significantly, this appeal comes to the Court not on a motion to dismiss, nor on summary judgment, but on a final judgment following a full trial on the merits. J.S., at 57a-200a. A district court's findings of fact "shall not be set aside unless clearly erroneous." FED. R. CIV. P. 52(a). Under this standard, when the district court's "account of the evidence is plausible in light of the record viewed in its entirety," that account of the evidence must control the appeal even when the appellate court is "convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson*, 470 U.S., at 574. If there are "two permissible views of the evidence" then the district court's "choice between them cannot be clearly erroneous." *Id.*; *see also United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949). And the deference demanded by Rule 52(a) is "even greater" when the district court's

findings "are based on determinations regarding the credibility of witnesses." *Anderson*, 470 U.S., at 575.

The Court has left no doubt that Rule 52(a)'s clearly-erroneous standard applies to appellate review of a district court's findings concerning minority vote-dilution claims under §2. *Gingles*, 478 U.S., at 78-79; *see also Rogers v. Lodge*, 458 U.S. 613, 622, 627 (1982). This high degree of deference is accorded *both* to the district court's determination of the ultimate "question whether electoral structures had a 'discriminatory effect,' in the sense of diluting the minority vote," *Gingles*, 478 U.S., at 79, as well as to each of the subsidiary findings underlying the district court's ultimate determination, *see Rogers*, 458 U.S., at 623. Application of the clearly-erroneous standard in this context is particularly appropriate because determining "whether the political process is equally open to minority voters . . . is peculiarly dependent on the facts of each case, . . . and requires an intensely local appraisal of the design and impact of the contested electoral mechanisms." *Gingles*, 478 U.S., at 79 (citations and internal quotations omitted).

As in *Gingles*, the district court in this case was "composed of local judges who are well acquainted with the political realities of the State," *id.*, at 80, and on appeal this Court should give appropriate deference to that court's conclusion that the State's map does not in fact have a dilutive effect on minority voting strength in Texas.

### B. The District Court's Finding That the Changes to District 24 Did Not Constitute Vote Dilution Was Not Clearly Erroneous.

The Jackson Appellants challenge whether the State could choose to change the lines of old CD 24 without violating §2 of the Voting Rights Act.

In this Court, they seriously challenge only one aspect of the district court's opinion – whether §2 permits a State to dismantle a district "effectively controlled by African-American voters, merely because it is impossible to draw a district in which African-Americans are an absolute mathematical majority of the population." Jackson Br., at i. Thus, the issue is framed as a challenge to the Court's

statement in *Gingles* that, in a §2 case, "the minority group must be able to demonstrate that it is sufficiently large and geographically compact *to constitute a majority* in a single-member district." 478 U.S., at 50 (emphasis added).

Appellants' question presented is a straw man. Whatever merit there might be to the abstract proposition that a minority group need not constitute an "absolute mathematical majority" to be protected by §2,[89] the facts of this case do not remotely present that issue.

Indeed, *the district court expressly declined to reach* the question that now forms the basis of virtually Appellants' entire appeal concerning CD 24: "[T]he facts of this case offer no occasion to decide if there is a tolerable deviation from the [50%] rule." J.S., at 96a. Not only was the African-American voting-age population of 21.4% far too low to be a sensible deviation from any rule that required a group to "constitute a majority," Appellants' §2 claim was so factually deficient as to offer no need to resolve that legal question.

Nevertheless, the Jackson Appellants devote almost every word of their twelve pages of merits briefing on CD 24 to attacking what they term the "Fifth Circuit's Talismanic '50% Rule.'" *See* Jackson Br., at 32-43. Because the district court expressly declined to apply any such rule, Appellants' extended discussion provides little more than academic background for some future case challenging a lower court decision that might actually apply the 50% rule.

As for what the lower court in this case actually *did* decide, Appellants all but ignore the district court's adverse factual determinations on three critical aspects of their claim – each one of which is outcome determinative.

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[89] As an abstract question, Appellants' assertion that in *Gingles* prong one, "majority" really did not mean majority, is in substantial tension both with the plain text of §2, which protects minorities' ability "*to elect* representatives of their choice," 42 U.S.C. §1973(b) (emphasis added), and with *Gingles* prong three, which would entirely subsume prong one if prong one were read to no longer require a majority. *See* J.S., at 108a-09a; *see generally* Br. of Appellees Tina Benkiser and John DeNoyelles.

*First*, the Jackson Appellants presuppose – wrongly and contrary to the district court's explicit fact findings – that old CD 24 was controlled by African-American voters. To the contrary, the district court expressly found that, to the extent African-Americans had "opportunity" in old CD 24, it was entirely *dependent upon* "Anglos who vote with them in the general election for Democrats," J.S., at 110a-11a. Thus, the district court found, "Anglo Democrats control this district." J.S., at 111a-12a.

*Second*, the Jackson Appellants devote just one footnote to addressing whether African-American voters were cohesive under the second *Gingles* precondition. *See* Jackson Br., at 40 n.32. The record supports the district court's conclusion that such cohesion had not been shown. J.S., at 111a-12a. It also supports the conclusion that old CD 24 could not have been a so-called "coalition" district because, in primary elections, African-American and Hispanic voters were not remotely cohesive. J.S., at 99a, 111a.

*Third*, the Jackson Appellants also devote just one footnote to addressing whether they satisfied the third *Gingles* precondition relating to Anglo bloc voting. *See* Jackson Br., at 42 n.34. But the district court rightly concluded that on this record the high crossover voting defeated the §2 claim. J.S., at 110a-11a.

At a minimum, Appellants failed to meet the second and third *Gingles* preconditions. *See* 478 U.S., at 50-51. And because these findings of lack of cohesion and Anglo bloc voting were not clearly erroneous, *see id.*, at 78-79; FED. R. CIV. P. 52(a), and because they provide independent grounds supporting the district court's ultimate rejection of Appellants' old CD 24 vote-dilution claim, *see, e.g.*, *Growe*, 507 U.S., at 40-41 ("Unless these [three preconditions] are established, there neither has been a wrong nor can be a remedy"), this appeal does not present the Court with a meaningful opportunity to address Appellants' hypothetical arguments concerning the 50% rule.[*]

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[*] *See also* NAACP LDEF *Amicus* Br., at 14 (conceding that, even under this proposed rule, "proof of the other two *Gingles* preconditions would remain necessary").

Accordingly, the Court should affirm the district court's judgment, and save a searching inquiry into the meaning and application of *Gingles*'s first prong for a case in which a holding on that issue could impact the judgment.

### 1. The district court's finding that African-American voters did not control old CD 24 was not clearly erroneous.

*Gingles*'s first precondition – the only one to which Appellants devote any attention in their briefing – requires the complaining minority group "to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." 478 U.S., at 50; *see* Jackson Br., at 32-43. Of course, there is no dispute that African-Americans did not constitute a majority in old CD 24; they constituted only 21.4% of the voting age population of that single-member district. *See* J.S., at 107a. Nevertheless, Appellants urge the Court to hold that the first *Gingles* prong about a group being "sufficiently large . . . to constitute the majority" can be satisfied by a group comprising roughly one-fifth the population of the district if that group demonstrates that it "effectively control[s]" its elections. *See* Jackson Br., at i, 32-39.

But the Jackson Appellants build their argument on a false premise. The district court found as a factual matter that African-American voters did *not* control elections in old CD 24. J.S., at 110a-112a. And that finding, which undermines the very core of Appellants' argument, was not clearly erroneous.

#### a. Appellants' argument depends on low voter turnout by Anglos and Hispanics – both groups being larger than African-American voters – and ignores the largely open Texas primary system.

In old CD 24, African-American voters constituted 21.4% of the voting-age population. J.S., at 107a. Hispanics made up 33.6% of the voting-age population and 20.8% of the citizen voting-age population, J.A., at 337, 339, and Anglos were the largest ethnic group in the district,

making up 40.7% of the voting-age population and 49.8% of the citizen voting-age population. State Exh. 9; J.A., at 339. Thus, African-Americans comprised the *third largest* racial group in the district, or roughly one-fifth of the voting-age population in the district.

The Jackson Appellants' central premise is that the 21.4% of African-American voters in CD 24 controlled the election. But in a winner-take-all election, a group that constitutes just *one-fifth* of the voting-age population can control a particular election outcome only if the remainder of the population acquiesces – either by voting in harmony or by staying home.

The Jackson Appellants hypothesize that control of the Democratic *primary* is tantamount to control of the entire election because a significant number of Anglos and Hispanics will typically turn out for the general election and vote Democratic. Jackson Br., at 41. Thus, the Jackson Appellants' theory depends on the Anglos and Hispanics in the district, *first*, staying home on primary day and, *second*, showing up and voting Democratic on election day.

The nature of this argument – which hinges upon low turnout by the other members of the electorate and makes an artificial distinction between primary and general elections – was explored at the closing arguments after trial, in which the following exchange occurred regarding the relative status of old CD 24 and old CD 25:[21]

> "JUDGE HIGGINBOTHAM: How do these numbers differ from the district in Houston carried by an Anglo [Democrat]?
>
> MR. SMITH: Well, they're not –
>
> JUDGE HIGGINBOTHAM: Tell me the numbers of the two districts.

[21] Old CD 25 was remarkably similar in ethnic composition to old CD 24. It contained 22% African-American voting-age population 30.7% Hispanic voting-age population, *see* J.A., at 337, and 41.2% Anglo voting-age population, *see* State Exh. 9.

MR. SMITH: The two districts are quite similar. The only reason why there's a view that 25 is –

JUDGE HIGGINBOTHAM: They're almost identical.

MR. SMITH: – less – it's not quite as Democratic a district. Mr. Kirk and Mr. Sanchez both carried 25 by only about two percent because there's more Anglo participation in –

JUDGE HIGGINBOTHAM: The difference between the two really is how Democratic they are.

MR. SMITH: *Actually, the difference is that there are more Hispanics taking up space in District 24*, and as a result there is more opportunity for the Democratic vote to come from the African-American community.

JUDGE ROSENTHAL: Again, you just sort of underscored the question that I asked you. *Are you considering Hispanics in 24, quote, filler people*, or are you considering them an active part of this minority coalition that together with the African-American vote demands protection?

MR. SMITH: They are –

JUDGE ROSENTHAL: You seem to be arguing both.

MR. SMITH: Well, I'm suggesting that you ought to look at the primary and the general election separately. *In the primary they are essentially irrelevant* in the sense that if you already have 65 percent of the vote for the African-Americans[,] they control. There are some Hispanics voting as well, but they are never going to overcome the African-American candidate of choice any more than the Anglos will." *See* Tr. of Closing Arg., at 15:19-16:25 (emphases added).

Setting aside that building a voting-rights claim predicated on the *lack* of participation of Hispanic voters hardly seems consistent with the salutary goals of the Voting Rights Act, the Jackson Appellants' theory does not fit the evidence.

Relying on the present lack of involvement of other members of the electorate does not show that African-American voters can elect *their* candidate of choice. Rather, the record demonstrates that, at most, they can elect a Democrat who happens not to offend the sensibilities of the much larger Anglo and Hispanic communities. That does not establish that African-American voters in old CD 24 could have elected, for example, an African-American candidate whom they happened to favor, because such a candidate might very well have broken apart their fragile political coalition. Indeed, because of the political reality of how the Texas primary-election system works,[92] it is foolish to imagine that the African-American voters could exercise meaningful control if Anglo or Hispanic voters were motivated to appear.

Appellants highlight a figure of 64% of the Democratic primary electorate being African-American, *see* Jackson Br., at 40-41 & n.32 – but that figure is quite misleading. After all, in old CD 24, only approximately one out of twenty voters participated in the 2002 Democratic Primary. State Exh. 22. Of that, while 14.5% of African-American voters turned out, only 3.8% of Hispanic voters and a scant 1.3% of Anglo voters did so. State Exh. 22. When Appellants say that "64%" of the primary electorate was African-American, they necessarily ignore the vastly larger number of *potential* primary voters, both Anglo and Hispanic,[93] who could well turn out if motivated to do so.

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[92] Texas does not have party registration. Instead, any Texas voter who has not yet voted in a primary in the same calendar year can choose to vote in *any* primary on election day. *See* TEX. ELEC. CODE §162.002. When they do so, they are then considered to be "affiliated" with that party, but only for the duration of the same year. *Id.* §§162.003, 162.010, 162.012.

[93] Recognizing the problem, the Jackson Appellants say that, "In fact, Anglo Democrats constituted only about 18% of the district's general electorate," adding that, "Far outnumbered by African-American voters, they had no ability to control who the party nominated." Jackson Br., at 41 n.33. As neither statement is supported by a record citation, it is somewhat difficult to sort out precisely what Appellants are arguing. It appears, however, that they are confusing

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### b. Appellants' expert testimony was itself a sufficient basis for the court's factual finding.

The Jackson Appellants not only failed to carry their burden of proof on this issue; their own expert's testimony provided sufficient evidentiary basis for the district court's factual finding that African-American voters did not control old CD 24.[24]

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two different problems. First, the number "18%" appears to be the percentage of the overall turnout in the general election that is Anglo and votes for the Democrat. Thus, the Jackson Appellants invite a comparison between the 33% figure for African-American voters (whom the Jackson Appellants presume to have voted 100% Democratic) and the smaller 18% number for Anglos who happened to vote for the Democrat. But that says nothing about what would happen *either* if more Anglos were motivated to come to the polls *or* if Anglos who otherwise would have voted for a Democrat instead voted in a racially-polarized manner. Second, equally perplexing is the statement that "[f]ar outnumbered by African-American voters, [Anglo Democrats] had no ability to control who the party nominated." Jackson Br., at 41 n.33. The demographics of the region make clear that African-Americans are far less numerous than either Anglos or Hispanics. The Jackson Appellants are simply talking about turnout rates on primary day, which could easily change if the ballot featured a candidate besides Anglo candidate Martin Frost.

[24] The Jackson Appellants' assertion that the State's expert provided deposition testimony that old CD 24 "performed" for African-Americans, *see* Jackson Br., at 9, is misleading. In his deposition, the State's expert made clear that African-Americans could *not* control the general election in old CD 24, and that in his judgment the old district was not protected by §2 of the Voting Rights Act. *See* Jackson Pls. Exh. 140 (Gaddie expert deposition), at 91; *see also* J.S., at 110a n.114. He did agree at one point that old CD 24 "perform[ed]" for African-Americans: "As I use that term, yes." Jackson Pls. Exh. 140 (Gaddie expert deposition), at 33; *see also* J.A., at 219. But he later explained that old CD 24 "perform[ed]," using his lexicography, simply because the minority candidate of choice was elected, and notwithstanding the fact that the general election was "not . . . controlled by the minority vote." Jackson Pls. Exh. 140 (Gaddie expert deposition), at 98; *see also id.*, at 100 ("*[T]he swing vote is not coming out of the African-American community*. It's coming out of the Anglo community." (emphasis added)).

Beginning first with endogenous races,[24] the data demonstrate that Anglo Democrat Martin Frost has never faced a primary opponent, and so by definition has never faced an African-American primary opponent. J.S., at 111a; *see also* J.A., at 97, 107. Thus, the mere fact that African-Americans have voted consistently for Frost in the primaries (when they had no other choice), hardly demonstrates that they could elect *their* candidate of choice if their preference ever shifted to a different candidate – or, indeed, that they could elect their candidate if Frost were not to run again. Indeed, on the critical measure of ability to elect a candidate of choice – whether African-American voters, if they chose, could elect an *African-American* candidate of choice – there are no data whatsoever from endogenous races. As the district court observed, because "no Black candidate has ever filed in a Democratic primary against Frost," "[w]e have no measure of what Anglo turnout would be in a Democratic primary if Frost were opposed by a Black candidate." J.S., at 111a.[25]

An examination of exogenous races sheds further light on that critical question. The regression analyses offered by Appellants' expert Allan Lichtman demonstrate that African-American voters could *not* effectively control old CD 24 unless their preferences happened to be shared by Anglo voters. Dr. Lichtman examined three exogenous contests: the 1998 Attorney General Democratic primary, a 2002 Court of Criminal Appeals Democratic primary, and the 2002 United States Senate race; he selected those three because they presented direct contests between African-American and Anglo candidates.

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[24] An "endogenous" race is one conducted *only* in the relevant district – such as the congressional race itself. An "exogenous" race is one conducted in a different geography (each as statewide). To analyze an "exogenous" race, data from each voting precinct in the district is reaggregated to isolate how that district's voters voted in the race.

[25] Although there was testimony from one African-American politician that he personally believed he could beat Frost, *see* Tr. 12/17/03 PM, at 126:7-15 (Sen. Royce West), neither he nor any other African-American candidate has ever run in the primary.

In the 1998 Attorney General Democratic primary, the African-American voters of old CD 24 gave 74.3% of their support to African-American candidate "Judge Morris Overstreet, a widely known, respected, and distinguished lawyer and judge." J.S., at 112a; *see* State Exh. 20. Nevertheless, African-Americans were unable to control the primary, because Hispanics and Anglos voted overwhelmingly for Overstreet's Anglo opponent. *See* State Exh. 20. Therefore, Overstreet lost CD 24, 35.3% to 64.7%. *See id.*

In the 2002 Court of Criminal Appeals election, the African-American vote in Dallas and Tarrant Counties fractured, with 40% supporting African-American candidate Whittier, and 60% supporting his Anglo opponent, who ultimately prevailed with large percentages of the Anglo and Hispanic votes. *See* J.A., at 94-95 (Lichtman Report, at 20).

And, in the 2002 Senate race, African-American candidate Kirk prevailed with 99% of the African-American vote in Dallas and Tarrant Counties, 39% of the Anglo vote, and 0% of the Hispanic vote. As the district court found based on the testimony before it concerning Texas politics, the Kirk race was less probative than the first two because he had been a "popular mayor of Dallas" and so the "'friends and neighbors' effect" accounted for some of his strong performance in old CD 24. J.S., at 112a.

Thus, the three exogenous races *introduced by Appellants* yielded one (Overstreet) where the African-American candidate of choice was defeated in old CD 24, one (Whittier) where the African-American vote was fractured and the candidate who won was an Anglo who was also preferred by Anglo voters, and one (Kirk) where the African-American candidate of choice prevailed with a plurality of Anglo support for a popular former Mayor.

This evidence can at best be deemed ambiguous, and a fair reading would tend to show that African-American voters do *not* themselves control the district. Given these data, and the Plaintiffs' unmet burden of proof, the district court's factual finding to that effect was not clearly erroneous.

**c. Comparison with old CD 25 further demonstrates that old CD 24 was deliberately designed to be, and in fact was, controlled by Anglo Democrats.**

Old District 25 was remarkably similar in ethnic composition to old District 24. It contained 22.0% African-American voting-age population, 30.7% Hispanic voting-age population, and 41.2% Anglo voting-age population. J.A., at 337; State Exh. 9. Like old CD 24, it elected an Anglo Democrat, and, as with old CD 24, Appellants defended the district by arguing that it was "controlled" by African-Americans because African-American voters typically comprised the majority of the Democratic primary, and the Democrat reliably prevailed in the general election. *See* Jackson Tr. Br., at 3 & n.3 (Dec. 3, 2003) (docket #115).

But one wrinkle made defense of old CD 25 a bit more difficult: the incumbent Congressman, Anglo Democrat Chris Bell had in 2002 defeated the African-American-candidate-of-choice, African-American Carroll Robinson, who was preferred by 69% of African-American voters. J.A., at 127-28 (Lichtman Report, Table 17). Nevertheless, Appellants maintained that old CD 25 could not be altered because, in their judgment, it effectively functioned as an African-American opportunity district. *See* Jackson Tr. Br., at 26 n.7 (Dec. 3, 2003) (docket #115).

Under Plan 1374C, old District 25 was transformed into new District 9, which had a markedly greater African-American voting-age population (36.5%). J.A., at 338. In 2004, incumbent Anglo Democrat Chris Bell ran in that new district, and was roundly defeated by an African-American Democrat, now-Congressman Al Green, 66.5% to 31.3%. *See* Election Returns Database, *supra* note 3.

Tellingly, Appellants' arguments about old CD 25 – which had virtually identical numbers to old CD 24 – have completely disappeared from this case. Given the subsequent primary performance, where African-American voters (with substantially increased numbers) overwhelmingly demonstrated that they preferred electing African-American Democrat Al Green to Anglo Democrat Chris

Bell, there simply was no coherent way for Appellants to continue to argue that African-Americans controlled old CD 25 or that Bell was really the African-American candidate of choice.

Since those arguments were repeated by Appellants virtually verbatim with respect to old CD 24 and old CD 25, the inference is plain.

**d. Other evidence – including direct testimony from African-American elected officials – confirmed that District 24 was drawn to elect Anglo Democrats.**

The trial court's fact finding was further supported by the specific history of the district, including direct testimony of elected officials regarding how the racial dynamics of such a district worked in Texas politics.

The district in question was the product of the 1991 partisan gerrymander that was called the "'the shrewdest [gerrymander] of the 1990s.'" J.S., at 106a-107a. (citing MICHAEL BARONE, THE ALMANAC OF AMERICAN POLITICS 2002, at 1448). The architect, both of that statewide gerrymander and of this particular district, was old CD 24's Congressman, Martin Frost. J.S., at 106a-107a. The district linked traditionally Democratic groups throughout the Dallas-Fort Worth metroplex, bridging together a mix of Anglos, Hispanics, and African-Americans.

The circumstances behind the creation of District 24 were discussed at length by African-American Democratic Congresswoman Eddie Bernice Johnson, "who holds a seat in an adjacent largely Black district." J.S., at 107a. She testified that old CD 24's design was no accident; that the district had deliberately been drawn "for an Anglo Democrat." J.S., at 107a. Through combining the opposing groups of African-Americans and Hispanic voters, the 1991 map was designed to ensure that an Anglo Democrat, and only an Anglo Democrat, could win:

> "Q. What type of problems was the Dallas African-American population encountering in terms of being able to create [District 30]?

A. *It was split up, of course, to elect white Democrats. . . .*

Q. . . . I wanted just to ask whether it's your opinion that the Hispanic population is divided across Congressional Districts now in the current plan?

A. To – yes, to a certain degree.

Q. And what would you say is the motivation for that division?

A. I'll have to answer that the same way I answered to my attorney. It's to accommodate others.

Q. And, in particular, white Democrats?

A. Martin Frost." J.A., at 263-65 (emphasis added).

Similar testimony was given at trial by State Representative Ron Wilson, an African-American Democrat elected from the Houston area. He testified:

"Q. I have heard both testimony and argument from one side of the room in this case suggesting that *District 24* up in Dallas is a District that *would elect a Black for Congress if pitted against an Anglo*. What's your thought about that?

A. I think it would elect a Black if it was Martin Frost's long lost, you know, Black child, but . . . [t]here's no way. *There's absolutely no way it could happen*." J.A., at 277 (emphasis added).[97]

* * *

Given the endogenous data, the exogenous data, the comparison to old CD 25, and the unusually candid direct testimony (which the district court heard in open court and deemed credible), the district court's conclusion that old District 24 was *not* controlled by African-Americans is hardly clear error – indeed, it seems the far more plausible hypothesis. As the court explicitly found: "[T]hat Anglo Democrats control this district is the most rational conclusion." J.S., at 111a-112a. That "account of the evidence" – that a congressional district that had been drawn by an Anglo Democrat,

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[97] *See generally* Ron Wilson *Amicus* Br.

for an Anglo Democrat, and had only ever elected an Anglo Democrat was effectively controlled by Anglo Democrats – "is plausible in light of the record" and thus cannot be clearly erroneous. *See Anderson*, 470 U.S., at 574.

**2. The district court's finding that Appellants failed to prove cohesion was not clearly erroneous.**

On the second *Gingles* precondition – political cohesion by the minority group – the district court made a factual finding that old CD 24 lacked the necessary voter cohesion. Based on the trial evidence, the court found that Appellants failed to meet their burden to prove that African-American voters in the district voted cohesively to support a vote-dilution claim. J.S., at 112a ("Nor is the cohesiveness of this 21.[4]% black voting age population clear.");[98] *see also Gingles*, 478 U.S., at 51 ("the minority group must be able to show that it is politically cohesive"). The district court found, in addition, that there was absolutely no cohesion between the Hispanic and African-American voting populations of old CD 24 so as to support even an arguable "coalition" theory. J.S., at 99a ("Here, there is no serious dispute but that Blacks and Hispanics do not vote cohesively in primary elections."). Those findings are fully supported by the evidence, and are not clearly erroneous.

**a. Appellants failed to show cohesion within African-American voters.**

To determine whether African-American voters in old CD 24 voted cohesively, the Jackson Appellants' principal statistical expert again focused on three statewide primary races: the 2002 Senate race with African-American candidate Ron Kirk, the 2002 Court of Criminal Appeals race with African-American candidate Julius Whittier, and the 1998 Attorney General race with African-American candidate Morris Overstreet. *See* J.A., at 75-76, 94-95 (Lichtman

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[98] The district court here cited African-American voting-age population as 21.6%, rather than 21.4%, which appears to be merely a typographical error.

Report Tables 2 & 6). According to Appellants' expert, in the first race Mr. Kirk received 99% of the African-American vote, in the second race Mr. Whittier received 40% of the African-American vote, and in the third race Judge Overstreet received 66% of the African-American vote in Dallas County and 76% of the African-American vote in Tarrant County. *See* J.A., at 75-76, 94-95 (Lichtman Report Tables 2 & 6). Thus, in the three races examined by Dr. Lichtman, one (Kirk) reflected strong cohesion among African-American voters, one (Whittier) demonstrated no cohesion whatsoever, and one (Overstreet) showed appreciable but not overwhelming cohesion.

Moreover, as the district court found, results from the Kirk race were of limited probative value. J.S., at 112a. Because Mr. Kirk had previously served as Mayor of Dallas, expert testimony indicated that one would expect a significant "friends and neighbors" increase in his Dallas-area numbers in a statewide race. *See* Tr. 12/12/03 PM, at 97:16-98:24. At trial, Dr. Lichtman attempted to maintain that any such advantage would be offset by the same "friends and neighbors" benefit accruing to his Dallas-area Democratic primary opponent Victor Morales. *Id.*; *see also* J.S., at 112a. Based on its familiarity with Texas politics, the district court unequivocally rejected that argument, noting that while Mr. Kirk was a "former popular mayor of Dallas," Mr. Morales was "actually from Crandall, a town of 3,000 people some 75 miles away." J.S., at 112a.

Discounting the results in the Kirk race, Appellants were left with one race (Whittier) showing *no* African-American vote cohesion and one race, involving a "widely known, respected, and distinguished [African-American] lawyer and judge," J.S., at 112a, (Overstreet) showing *some*. On these facts, the district court's determination that Appellants failed to meet their burden of proving vote-cohesion among the 21.4% African-American voting age population of old CD 24 cannot be clear error. *See, e.g., Anderson*, 470 U.S., at 574 ("Where there are two

permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous.").[99]

**b. Lack of voting cohesion between African-American and Hispanic voters was beyond serious dispute.**

Nor could there even arguably have been a "coalition" claim between African-American and Hispanic voters because the data showed that, in primary elections, they tended to vote as polar opposites. As the district court rightly found, "there is no serious dispute but that African-Americans and Hispanics do not vote cohesively in primary elections." J.S., at 99a.[100]

The Court has explained that, "[a]ssuming (without deciding) that it [is] permissible . . . to combine distinct ethnic and language minority groups for purposes of assessing compliance with §2, when dilution of the power of such an agglomerated political bloc is the basis for an alleged violation, *proof of minority political cohesion is all the more essential*" and must meet a "higher-than-usual" standard. *Growe*, 507 U.S., at 41 (emphasis added); *see also Page v. Bartels*, 248 F.3d 175, 197 (CA3 2001). Appellants not only failed to demonstrate a "higher than usual" level of cohesion between African-American and Hispanic voters in old CD 24; they failed to show *any* cohesion between these minority groups whatsoever. *See* J.S., at 110a-11a. ("That there is no

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[99] Appellants' only response to this *claim-dispositive* finding comes in a lone footnote where they summarily state – without citation to any authority – that the district court "clearly erred" in its conclusion because §2 "liability turns not on perfect unanimity within the minority." Jackson Br., at 41 n.32. That may be so, but "perfect unanimity" is a world away from the evidence before the district court, showing that while 72% of African-American voters voted for the African-American candidate in one probative race, only 40% of African-American voters voted for the African-American candidate in the other. As the court reasonably concluded, on this record the evidence did not prove cohesion. J.S., at 112a.

[100] The district court correctly noted that two groups cannot be deemed cohesive under *Gingles* unless they vote together in both primary and general elections. J.S., at 99a-100a n.88 (citing *LULAC v. Clements*, 999 F.2d 831, 850 (CA5 1993) (en banc)); *cf. Growe*, 507 U.S., at 42.

cohesion between Black and Latino voters in the primary contests is beyond serious dispute.").[101]

Dr. Lichtman's analysis amply demonstrated this complete absence of cohesion. For example, in the Kirk primary he found African-American voters supporting the African-American candidate Kirk at a rate of 99% and Hispanic voters supporting the Hispanic candidate Morales at a rate of 90%; in the Kirk runoff, he found African-American voters supporting Kirk at a rate of 98%, and Hispanic voters supporting Morales at a rate of 100%. J.A., at 94-95 (Lichtman Report Table 6). Likewise, in the Overstreet race, Dr. Lichtman found that while 66% of African-American voters in Dallas County voted for African-American candidate Mr. Overstreet, 0% of Hispanic voters did. Notably, the Overstreet race was not even an African-American-Hispanic race; rather, 100% of Hispanic voters in the CD 24 voted for the Anglo candidates on the Democratic ballot. J.A., at 94-95 (Lichtman Report Table 6). Thus, far from demonstrating cohesion between African-American and Hispanic voters in CD 24, the data demonstrated that, in contested primaries, the two groups were virtually at war.[102]

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[101] It is no answer for Appellants to respond that African-American and Hispanic voters demonstrated vote cohesion in *general* elections (which is to say no more than that, in CD 24, both groups tend to be Democrats). The entire linchpin of Appellants' argument as to how the 21.4% of African-Americans in old CD 24 could "control" the election was the premise that they "control" the primary; the open antagonism between African-American voters and Hispanic voters in contested primaries fundamentally undercuts that premise.

[102] Hence, the reason why, even "[a]ssuming" that one can theoretically "combine distinct ethnic and language minority groups for purposes of assessing compliance with §2," the Court has demanded, at a minimum "higher-than-usual" "proof of minority political cohesion." *Growe*, 507 U.S., at 41. Appellants have described old CD 24 as "majority-minority," J.A., at 97, which is technically true, with respect to VAP, which totals 54.6% for Hispanics plus African-Americans, but is not true for the more relevant CVAP, which totals 46.3%. J.A., at 98, 337, 339. But, given the complete animosity between African-Americans and Hispanics in contested primaries, Hispanic voters could be counted on to vote in unison against any African-American candidate, which is a large part of what ensured (as intended) that CD 24 could only elect an Anglo Democrat.

The district court also heard direct testimony confirming these data. For example, State Senator Royce West – an African-American Democrat who lived in old CD 24 and was elected from and represented much of that area in the State Senate for eleven years – expressly acknowledged the lack of cohesion between African-American and Hispanic voters in Democratic primaries:

> Q. [In] [p]rimary elections, [i]n a race where an African-American candidate is running against an Hispanic candidate, in your experience, do voters in CD 24, do African[-Americans] and Hispanics tend to vote together or do they tend to vote opposed to each other?
>
> A. Opposed to one another.

Tr. 12/17/03 PM, at 129: 20-25-130:1, J.A., at 259.[103]

On this record, there was no clear error in the district court's conclusion that Appellants failed to carry their burden of demonstrating a cohesive minority population in old CD 24. And under *Gingles*, that conclusion is fatal to Appellants' §2 claim. *See* 478 U.S., at 51.

### 3. The district court's finding that Appellants failed to show Anglo bloc voting against minority candidates of choice was not clearly erroneous.

The district court also found against Appellants on the third prong of *Gingles* – sufficient Anglo bloc voting to usually defeat the minority candidate of choice. *See id.* The court found that: "Black opportunity here lies in coalitions with Anglos who vote with them in the general election for Democrats." J.S., at 111a.[104]

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[103] Senator West likewise acknowledged that, in Democratic primary elections between African-American and Anglo candidates, there was no "tendency that predominates" in favor of Hispanic and African-American voters voting together. *Id.*, at 130:2-19, J.A., at 259.

[104] The district linked traditionally Democratic groups throughout the Dallas-Fort Worth metroplex, bridging together a mix of Anglos, Hispanics, and African-Americans. "The 24th is a Democratic district, and its 'coalitions' are simply minority Blacks joining with majority

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The district court's conclusion was, once more, well-supported by the trial evidence. Looking again to Dr. Lichtman's numbers for the three races he examined in Dallas and Tarrant Counties – the geographic region in which Appellants sought to prove the *Gingles* factors – in the 2002 Senate primary and runoff African-American candidate Kirk received 39% and 48% of the Anglo vote respectively; in the 2002 Court of Criminal Appeals race African-American candidate Whittier received 32% of the Anglo vote; and in the 1998 Attorney General primary African-American candidate Overstreet received 8% of the Anglo vote in Dallas County and 0% in Tarrant County. J.A., at 75-76, 94-95 (Lichtman Report Tables 2 & 6). Thus, in the three races examined by Dr. Lichtman, one (Kirk) demonstrated a complete absence of Anglo bloc voting, and one (Whittier) reflected substantial Anglo crossover. Only one (Overstreet) suggested that Anglo bloc voting could be in play.

Indeed, the unweighted mean of Dr. Lichtman's numbers yielded an Anglo crossover rate of 30.75%, a figure in the same range as those on which this Court has previously upheld a district court's finding that there was no Anglo bloc voting under *Gingles* prong three. *Abrams v. Johnson*, 521 U.S. 74, 92 (1997) (finding no §2 violation where "the average percentage of Whites voting for black candidates across Georgia ranged from 22% to 38%"); *see also Page v. Bartels*, 144 F.Supp.2d 346, 365 (D.N.J. 2001) (finding no racial bloc voting where plaintiffs' expert testified that Anglo crossover voting averaged 35.6%).[106]

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Anglos voting a Democratic ticket in the general election." J.S., at 105a-06a.

[106] In *Abrams*, the lower court also considered the significant successes achieved by minority candidates. *Abrams*, 521 U.S., at 92. Recent Texas history shows considerable success by minority candidates, who have won multiple statewide offices by garnering significant Anglo support. For example, Chief Justice Wallace Jefferson and Justice Dale Wainwright of the Texas Supreme Court are both African-Americans who have won statewide elections to the bench, and Michael Williams is an African-American who won a seat on the Railroad Commission, which governs much of the Texas oil industry. Likewise, Railroad Commission Chairman Victor Carrillo is an Hispanic elected

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Again, direct evidence confirmed the statistical data before the district court. On cross-examination, African-American and Democratic State Senator Royce West disclaimed district-wide Anglo bloc voting in old CD 24:

> We have a pretty good coalition right now of African-Americans, Hispanics and Anglos working together. So I can't think of any specific instances . . . where here recently I've seen that polarized voting as it relates to the Congressional District.

Tr. 12/17/03 PM, at 131:7-11, J.A., at 260.

On these facts, the district court's finding that Appellants failed to meet their burden of proving *Gingles*'s third precondition was not clearly erroneous. *See Gingles*, 478 U.S., at 51, 79; *Anderson*, 470 U.S., at 574 ("When there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous."). [106] And, like the prior two findings, it disposes of their claim.

### C. In Any Event, The So-Called "Dismantling" Claims Are Ill-Conceived.

Two Appellants present what they style as "dismantling" claims, arguing that §2 prevents the State from making any changes to the district lines present in Plan 1151C for District 23 and for District 24. Jackson Br., at

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statewide in Texas, and former Supreme Court Justices Alberto Gonzales and Raul Gonzalez and former Railroad Comission Chairman Antonio Garza were all also Hispanics elected statewide.

[106] Again, Appellants' only response to this determination comes in a single footnote, where they assert that "[t]he fact that roughly 30% of Anglo voters in District 24 regularly supported African-American-preferred candidates in the general elections does not undermine a finding of racially polarized voting." Jackson Br., at 42 n.34. They state that *Gingles* found white bloc voting even with a crossover rate as high as 42%. Jackson Br., at 42 n.34 (citing *Gingles*, 478 U.S., at 78-80). But in *Gingles*, the Court was *affirming* a trial court's finding of fact under the clearly erroneous standard; the case hardly stands for the proposition that a 30.75% average could *not* support a district court's finding to the opposite effect. Indeed, in *Abrams* the Court affirmed a factual finding of the absence of bloc voting when the statewide crossover rates were in the range of 20% to 38% and crossover in the relevant congressional district was 23%. 521 U.S., at 92.

32-33; GI Forum Br., at 27-36. Each Appellant offers a similar logic – they assert that the preexisting district was a "protected" district under the Voting Rights Act (presumably under §5 of the Act) and accordingly, they assert, the State cannot make changes to that district. Jackson Br., at 32-33; GI Forum Br., at 27-36.

To the extent that Appellants want to entrench the old status quo – to prevent the State from moving the lines of these districts at all – that far oversteps the reaches of §2. Under §2, the State retains the latitude to choose *how* to cure even proven vote dilution. Although a successful §5 claim alleging that a covered action has not been precleared can force the State to return to the prior state of the law, *see Lopez v. Monterey County*, 519 U.S. 9, 20 (1996), a successful §2 claim still would afford the State the opportunity to draw a legal plan that reflects its own policy choices, *see Growe*, 507 U.S., at 32-34.

Appellants' theory improperly blurs together §2 and §5 of the Voting Rights Act. As Justice Kennedy noted in the plurality opinion in *Holder v. Hall*,

> "[t]o be sure, if the structure and purpose of §2 mirrored that of §5, then the case for interpreting §§2 and 5 to have the same application in all cases would be convincing. But the two sections differ in structure, purpose, and application." 512 U.S. 874, 883 (1994) (plurality).

Thus, "[r]etrogression is not the inquiry in §2 dilution cases." *Id.*, at 884 (citing S.REP. No. 97-417, at p.68, n.224 (1982) *as reprinted in* 1982 U.S.S.C.A.N. 177, 246 ("Plaintiffs could not establish a §2 violation merely by showing that a challenged reapportionment or annexation, for example, involved a retrogressive effect on the strength of a minority group.")).

Appellants' novel reading of §2 of the Act would also undercut the Court's recent decision in *Georgia v. Ashcroft*, 539 U.S. 461 (2003), by rendering State's discretion of *how* to comply with the Act virtually meaningless. The *Ashcroft* Court held that §5 leaves with States the choice between influence districts and majority-minority districts: "Section 5 does not dictate that a State must pick one of these methods

of redistricting over another." 539 U.S., at 480. The Court described that choice as a political one – "the State's choice ultimately may rest on a political choice of whether substantive or descriptive representation is preferable." *Id.*, at 483.

Appellants suggest, however, that the political latitude recognized by *Ashcroft* concerning §5 – "the flexibility to choose one theory of effective representation over the other" – is illusory because it is taken away by §2 of the same Act. *Id.*, at 482. But the Court has made clear that it has no desire to allow §2 to blur into the very distinct standards of §5, and vice versa. *See id.*, at 478-79 ("We refuse to equate a §2 vote dilution inquiry with the §5 retrogression standard."). Appellants would read §2 to require that courts rather than legislatures choose among influence districts, coalition districts, and majority-minority districts. That proposition was flatly rejected by *Ashcroft*.

In practical terms, Appellants' rule would also erect a barrier to any State that wished to accept the Court's invitation to explore alternate models of compliance with §5. In *Ashcroft*, the Court held that the efforts of a State to unpack formerly concentrated majority-minority districts to create influence districts was not in itself a violation of §5 of the Act. *Ashcroft*, 539 U.S., at 479-80. But if Appellants' reading of §2 is to be believed, Georgia would have surely violated §2 by doing precisely what the Court eventually blessed – reducing the concentration of a majority-African-American district in order to afford more electoral opportunity elsewhere in the map.

Accordingly, it is backwards for Appellants to suggest that – by recognizing a §2 cause of action to force a State to create "influence" or "coalition" districts – one might avoid the unnecessary packing of voters. Jackson Br., at 34. That was the reasoning explained by the *Ashcroft* Court for why a State should have latitude – so that, consistent with the State's policy preferences, it might choose a model of representation to comply with the Act that involved less packing of voters. 539 U.S., at 482. But §2 works very differently – it empowers plaintiffs to *force* the State to pack or unpack voters. In this case, the

Jackson Appellants seek the re-packing of voters into old CD 24. If their claim is approved, no doubt creative plaintiffs will attempt to force other States to create more 20% African-American districts in Democratic-leaning areas so that they, too, can claim that the Anglo Democrats those districts elect cannot be ousted from office without offending the Voting Rights Act.

That, of course, is not what the Voting Rights Act requires. The Voting Rights Act protects minority rights, not the electoral successes of a particular political party. And *Ashcroft* give States wide latitude to decide the specific means of protecting minority rights – in Texas, by creating an additional African-American and an additional Hispanic opportunity district. And nothing in the Voting Rights Act prohibits altering or dismantling existing Anglo Democratic districts to expand minority opportunity in majority-minority districts.

### D. The District Court's Determination That GI Forum's Proposed Plan 1385C Was Not Required by §2 Was Not Clearly Erroneous.

The GI Forum Appellants claim that Plan 1374C diluted Hispanic voting strength in South and West Texas – a region in which Hispanics constitute 58% of the citizen-voting-age population – because only six of the seven congressional districts drawn there were Hispanic-opportunity districts. *See* J.S., at 123a-24a, 129a. Appellants offered a demonstration plan (Plan 1385C) that purported to draw an additional Hispanic-opportunity district in South and West Texas – thus bringing Hispanic control over congressional districts in that area to a perfectly maximized seven-for-seven. J.S., at 124a.

The district court rightly focused on two aspects of the GI Forum demonstration plan – whether the demonstration districts are effective so as to offer *more* electoral opportunity to Hispanics, and whether earmarking seven-of-seven districts in the South and West Texas would be disproportional.

The district court found both that the demonstration plan would not satisfy the first prong of *Gingles* and that,

under the totality of the circumstances, there was no violation of §2. As for the first prong of *Gingles*, the district court found that the demonstration plan was insufficient because it spread population too thinly and required district configurations that would not be effective. J.S., at 138a. As for the totality finding, the district court noted its reliance on "detailed regression analyses of election data, performed by different experts," J.S., at 140a, "witnesses familiar with the areas covered," J.S., at 144a, and "testimony of elected officials from the districts at issue," J.S., at 145a. On that detailed record, the court explicitly found that "[t]he totality of facts and circumstances, including those pointing to proportionality, as well as past and predicted election outcomes and evidence as to the likely functioning of the newly-configured districts, does not show a violation of §2 in South and West Texas under Plan 1374C." J.S., at 149a.

**1. The district court's factual finding on the first *Gingles* precondition was not clearly erroneous.**

The court found against the GI Forum Appellants on the first prong of *Gingles*, the requirement that a demonstration plan "creat[e] more than the existing number of *reasonably compact* districts with a *sufficiently large* minority population to elect candidates of its choice." *De Grandy*, 512 U.S., at 1008 (emphasis added); *see also Growe*, 507 U.S., at 40. That finding was not clearly erroneous.

Although Appellants' demonstration plan had *nominal* citizen-majorities of Hispanics, it could achieve that mathematical mark only by spreading the Hispanic population out in a way that the district court found would create majorities too thin and too geographically dispersed to be politically effective. Thus, the district court found that the demonstration plan would not meet the first precondition of *Gingles* because "[t]here is neither sufficiently dense and compact population in general nor Hispanic population in particular to support such a configuration." J.S., at 138a.

The district court found that Appellants' demonstration districts had majorities too thin to be effective. In particular, CD 28 in the demonstration plan would have had only a 50.3% Hispanic citizen voting-age majority. J.S., at 130a. The district court considered testimony from experts for both plaintiffs and the State indicating that, because of low turnout rates, more than nominal majorities are needed for politically effective Hispanic-opportunity districts.[107] J.S., at 131a n.134. For those reasons, the court found that Hispanic citizens of voting age were not sufficiently numerous in the region to form seven effective districts. J.S., at 133a.

In so doing, the district court noted that Appellants' demonstration districts were not particularly compact. J.S., at 125a-26a n.125. It observed that the demonstration districts were relatively more "unusual" in shape than the State's districts and that the joining together of "disparate and distant communities" in the demonstration plan would render it more difficult for Hispanics to exercise political power given the smaller majorities they would hold in when spread among seven districts. *Id.* Those findings were not clearly erroneous.

**2. The district court's factual finding on the totality of circumstances was not clearly erroneous.**

The district court found, based on its review of the record, that the totality of circumstances did not favor the creation of a new Hispanic-opportunity district in South and West Texas.[108]

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[107] Representative Rubén Hinojosa, who represents CD 15, testified that because of low turnout rates, voter levels of approximately 57%-58% were necessary to achieve Hispanic control. J.A., at 243-44. Representative Charlie Gonzalez, who represents CD 20, also testified about the low voter turnout that afflicted the region. J.A., at 231-32.

[108] Even if effectiveness were not encompassed within the *Gingles* preconditions, the ultimate totality of the circumstances would encompass precisely the factors considered by the district court. *See De Grandy*, 512 U.S., at 1011 (indicating that the totality inquiry must make precisely such "judgments resting on comprehensive, not limited, canvassing of relevant facts"). As Appellants admit, the district court

(Continued on following page)

As a part of its examination of the totality of the circumstances, the three-judge court followed the dictate of *De Grandy* and considered whether the minority group had already achieved substantial proportionality of representation. J.S., at 126a-30a. The court did not treat proportionality as necessarily dispositive, but instead as "only one factor to be used in assessing the totality of circumstances to determine if unlawful vote dilution has created an 'unequal political and electoral opportunity' for a protected class." J.S., at 127a n.127 (citing *De Grandy*, 512 U.S., at 1022). Based on the entire record – including proportionality – the district court found that the totality of the circumstances did "not show a violation of §2 in South and West Texas under Plan 1374C." J.S., at 149a.

**a. As in *De Grandy*, Appellants focused their claim on only one region of the State, making a regional analysis appropriate.**

In *De Grandy*, the Court held that it did not need to reach the question of what geographic focus was appropriate to assess proportionality because the §2 claim at issue related only to a particular region; likewise the GI Forum Appellants' §2 claim expressly focuses on a single region of the State.[109] *Compare* J.S., at 127a-30a (noting that Appellants' *Gingles* challenge was so limited), *with* 512 U.S., at 1021-22 (noting that plaintiffs in *De Grandy* had chosen to focus on a specific area).

Throughout their brief, the GI Forum Appellants discuss their claims in terms of its impact on South and

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concluded that "under the totality of the circumstances, the GI Forum demonstrative districts did not afford Hispanic voters the opportunity to elect their candidate of choice." GI Forum Br., at 43. Given that the demonstration plan spread out the Hispanic population more thinly, and into districts that were less compact and cohesive, the three-judge court's totality finding is well supported on this record.

[109] The district court observed that there was no need to decide this question because the State achieved substantial proportionality both for the region and statewide. *See* J.S., at 127a-130a.

West Texas. *See* GI Forum Br., at 12 (focusing on "South and West Texas"); *id.*, at 13 (referring to "all seven Hispanic-majority districts created by the State in South and West Texas"); *id.*, at 40 ("The parties agree that South and West Texas are characterized by racially polarized voting."); *see also id.*, at 4 (referring to the 58 county region in which the State drew seven districts); *id.*, at 36 ("The State chose to expand the territory by which it drew Hispanic-majority districts by adding 14 whole or partial counties."); *id.*, at 38 (referring to "the decision to expand the redistricting territory and the number of districts located in the majority Hispanic South and West Texas"). They call their demonstration plan "a simple rearrangement of the boundaries of the State's seven Hispanic districts." GI Forum Br., at 40. Indeed, the demonstration map GI Forum introduced included districts *only* in South and West Texas, with the remainder of the map left blank. *See* GI Forum J.S. App., at 241.

Because the vote-dilution claim was expressly framed in terms of South and West Texas, that is the area in which the totality of circumstances – including its proportionality component – must be assessed. In *De Grandy*, the Court held that where the parties agreed in the district court on the area covered by the §2 claim, that area controls proportionality: "Thus, we have no occasion to decide which frame of reference should have been used if the parties had not apparently agreed in the District Court on *the appropriate geographical scope for analyzing the alleged §2 violation and devising its remedy*." *De Grandy*, 512 U.S., at 1022 (emphasis added).

**b. The district court rightly found that Hispanics were proportionately represented in South and West Texas.**

In South and West Texas, there can be no question that Hispanics enjoy substantial proportionality. Because Hispanics comprise 58% of the relevant population and, under Plan 1374C, can effectively control six of the seven

congressional seats (84%), the district court found that "proportionality is satisfied as to that area." J.S., at 494.

If an additional Hispanic-opportunity district were created in South and West Texas, it would give 58% of the relevant population control of 100% of the congressional districts. That sort of required "maximization" of potential majority-minority districts was explicitly rejected in *De Grandy* as an improper use of §2. 512 U.S., at 1022 (holding that the district court erred in not "address[ing] the statutory standard of unequal political and electoral opportunity," and that it "reflected instead a misconstruction of §2 that equated dilution with failure to maximize the number of reasonably compact majority-minority districts").

Indeed, the breadth of Appellants' claims mirrors a hypothetical that the Court gave in *De Grandy* of how a failure to consider proportionality would render §2 "absurd." *See De Grandy*, 512 U.S., at 1016-17. The Court hypothesized a State with voters spread evenly among ten districts, in which 40% of the voters were members of a minority group. *Id.* Although a proportional number would be four districts, under a maximization rule that group could achieve control of up to seven districts – a level of representation 75% more than proportionality. *Id.* The Court concluded that such a disproportionate result cannot be required because "it would be absurd" to read §2 to provide "a minority group with effective political power 75% above its numerical strength." *Id.*, at 1017.

The statistics in South and West Texas bring the *De Grandy* hypothetical to life. Hispanics make up 58% of the relevant population in the region. An arithmetically proportional level of representation would thus be four of the seven seats. Plan 1374C, in turn, gives Hispanics control of six of the seven congressional seats. And Appellants ask instead that Hispanics control all seven districts. This would create exactly the same "absurd" situation warned against in *De Grandy*. *Id.*

The Court has held that requiring maximization is inconsistent with "the very object of the statute." *De Grandy*, 512 U.S., at 1016-17. An alleged "[f]ailure to

maximize cannot be the measure of §2." *Id.*, at 1017. Thus, in *De Grandy* the Court held that, when a group has achieved opportunity substantially proportional to its share of the relevant population, that fact weighs heavily in the totality of circumstances. 512 U.S., at 1000.

Appellants accuse the district court of using its effectiveness analysis to create "a cap on the proportionality" that a minority group could achieve. GI Forum Br., at 46. That argument misses the point of the district court's focus on effectiveness. If districts are not *effective* districts, they will not improve the political opportunity held by Hispanics and are not required to be created by the Voting Rights Act. In that regard, the district court's treatment of effectiveness in its totality analysis mirrors the Court's description in *De Grandy* of the first *Gingles* factor as "requir[ing] the possibility of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." 512 U.S., at 1008.[110]

Appellants also attempt to characterize the State's proportionality argument as involving a district "located in one area of the state" being traded for a district "in a different area of the state." GI Forum Br., at i. There is only one "area of the state" at issue: South and West Texas. The districts in question – old CD 23 and new CD 25 – are *both* in the region for which GI Forum has sought to prove a §2 violation. *See* GI Forum J.S., at 241 (map). Thus, the instant case is unlike *Shaw II*, in which the State attempted to draw a district *outside* of the region of an alleged §2 violation. *Shaw v. Hunt*, 517 U.S. 899, 916-17 (1996) (*Shaw II*). There, such a district could not be a required "remedy" because it was not related to the "injury." *Id.*, at 917.

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[110] In *De Grandy*, the Court declined to consider the question of whether to apply a supermajority requirement to Hispanic districts. 512 U.S., at 1008-09. The Court did not need to reach that theoretical question because proportionality resolved the case. *Id.*, at 1009. For the same reason, there is no cause to reach the question here.

**c. The district court also found substantial proportionality for Hispanics on a statewide basis.**

The district court also addressed the question of whether the State's districts could meet proportionality on a *statewide* basis. J.S., at 149-50a. It concluded that – looking beyond the mathematical measures, as *De Grandy* counseled, 512 U.S., at 1023 – the record suggested substantial proportionality on a statewide basis.

Statewide, Plan 1374C provided six Hispanic-opportunity districts – a number one below what would be expected for pure "arithmetic proportionality," which would assign the group a share of the congressional delegation precisely matching its share of the relevant population. But the district court emphasized that having only six Hispanic-opportunity districts did not necessarily mean that the State's plan was not substantially proportional. J.S., at 129a-30a ("*De Grandy* emphasizes . . . that the inquiry is not merely mathematical."). As other factors weighing in the totality, the district court noted that Hispanics held substantial influence in at least two other districts that were not technically Hispanic-opportunity districts. J.S., at 129a-30a (discussing new CD 29 in Houston, where Hispanics comprise approximately 47% of the relevant population, and new CD 23, where the incumbent is an Hispanic Republican who has historically attracted substantial Hispanic crossover support). On that record, the district court found that the totality of circumstances did not support drawing a seventh Hispanic-majority district in South and West Texas.

Appellants dispute two aspects of the district court's findings about statewide proportionality. They cite 2004 census estimates for Hispanic citizen-voting-age population – figures that came out *after* the trial and that would be disconnected from any census block-level data available for drawing remedial plans – to suggest that proportionality should now require eight districts instead of seven. *See* GI Forum Br., at 48-49. But the district court found at trial that the Hispanic citizen-voting-age population of Texas was 22%, leading to seven districts as the number

that would achieve perfect "arithmetic proportionality." J.S., at 130a. That finding was not clearly erroneous.

Appellants also suggest that new CD 23 cannot be an influence district notwithstanding that Henry Bonilla, an Hispanic Republican, historically attracted significant Hispanic support from old CD 23 before 2002 and continues to do so in new CD 23. GI Forum Br., at 35.

Throughout his career, Congressman Henry Bonilla has attracted substantial support from the Hispanic community. Raised in the barrios of south San Antonio, Congressman Bonilla defeated a four-term incumbent Hispanic Democrat, earning 59% of the vote in a district drawn to elect a Democrat. He has since been reelected six times by garnering significant Hispanic support in the district. There is no disputing that Congressman Bonilla is a product of, and genuinely responsive to, the Hispanic community in his district.[111] *See generally* Brief of *Amicus Curiae* Congressman Henry Bonilla.

Appellant GI Forum places great focus on the relatively limited (8%) Hispanic support Congressman Bonilla received in 2002, *see, e.g.*, GI Forum Br., at 8, 30, 35, but they fail to mention that his c ponent, Henry Cuellar, was a very popular local politician in Laredo who benefited substantially from the "friends-and-neighbors" effect. *See* MICHAEL BARONE & RICHARD E. COHEN, THE ALMANAC OF AMERICAN POLITICS 2006, at 1657. Indeed, the very next election, Cuellar ran against incumbent Democrat Ciro Rodriguez in CD 28 (which now include large parts of

[111] Indeed, American GI Forum, the national parent of Appellant GI Forum of Texas, has publicly praised Congressman Bonilla's "great sensitivity to the special issues" affecting Hispanic veterans, and the "excellent working relationship" between Congressman Bonilla's office and GI Forum. Letter from Juan R. Mireles, National Commander, American GI Forum of the United States, to the Hon. Henry Bonilla, Member, United States House of Representatives (Sep. 24, 2002). Commander Mireles specifically thanked Congressman Bonilla for "being a voice and effective advocate" for Hispanic veterans. *Id.*

Laredo), and defeated him in the Democratic primary. Election Returns Database, *supra* note 3.

After the aberrational race in 2002, Congressman Bonilla's support returned to historic levels in 2004, as he won 23 of the 25 counties in his district, "some of them 85% to 95% Hispanic." *See* BARONE & COHEN, at 1657. Notably, he also carried the half of Webb County that remained in new CD 23 by a margin of 56% to 41%, *see* Election Returns Database, *supra* note 3, putting to rest any notion that Hispanics in that heavily-Hispanic county were "stranded" by the new map. *See* Bonilla *Amicus* Br., at 13-14.

By any measure, the district court's factual finding that considered CD 23 in its proportionality analysis was not clearly erroneous.

### E. The District Court's Finding That the Split of Webb County Did Not Violate the Voting Rights Act Was Not Clearly Erroneous.

GI Forum argues that the State should not have been permitted to alter the district boundary of old CD 23 – the district then and now held by Representative Henry Bonilla, an Hispanic Republican. *See* GI Forum Br., at 36-38. In particular, GI Forum asserts that the State moved roughly 100,000 people (largely Democratic-voting Hispanics) from Webb County into the neighboring CD 28, an Hispanic-opportunity district, while leaving many more Hispanics in CD 23. GI Forum Br., at 24. GI Forum claims that the State "stranded" those other Hispanics in new CD 23, a district that cannot elect their candidate of choice. *Id.*, at 35.

But old CD 23 elected the very same candidate. As the district court expressly found, "[e]ven under Plan 1151C . . . Congressional District 23 did not function as an effective opportunity district."[112] J.S., at 134a. The district

[112] GI Forum states the opposite in its brief, *see* GI Forum Br., at 7, 27, but does not establish that the district court's finding on this question was clearly erroneous.

continues to elect Henry Bonilla, whom the regression analyses said was not the Hispanic candidate of choice. J.S., at 134a. If anything, the voters moved from CD 23 in Webb County are now in a district (CD 28) where, the data show, Hispanic voters they *can* elect their candidate of choice. And in the 2004 election, they did just that, sending Henry Cuellar – the same popular Laredo politician who almost beat Henry Bonilla in the 2002 contest for old CD 23 –to Congress from new CD 28. *See* Election Returns Database, *supra* note 3.

GI Forum's complaint is addressed to *how* the State used its discretion to draw those six districts. To be sure, even under the Appellants' demonstration Plan 1385C, and any other alternative, some Hispanics will reside in districts that are not "performing" majority-minority districts. Yet, GI Forum urges that the State should have ensured that the particular Hispanics in old CD 23 were now drawn into an Hispanic-opportunity district. GI Forum Br., at 37-38. But a particular "§2 plaintiff has [no] right to be placed in a majority-minority district." *Shaw II*, 517 U.S., at 917 & n.9; *see id.*, at 947 (Stevens, J., dissenting) ("[S]atisfaction of the so-called *Gingles* preconditions does not entitle an individual minority voter to inclusion in a majority-minority district.").

Thus, unless GI Forum prevails on its argument that it is both possible and legally required for the State to draw seven effective Hispanic-opportunity districts, *see* Part III.D, *supra*, attacking CD 23 in isolation cannot improve Hispanic opportunity. That is because, in Plan 1374C, it is undisputed that there are already six Hispanic-opportunity districts. J.S., at 140a; *accord* GI Forum Br., at 5, 47-48. Unless GI Forum's §2 claim necessitates seven such districts – to offer *more opportunity* than does the State's plan – its claim does not sound in vote dilution. As *De Grandy* held, "a claim that single-member districts dilute minority votes . . . requires the possibility of creating *more than the existing number* of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." 512 U.S., at 1008 (emphasis

added). Absent the necessity of that remedy, GI Forum's complaint about Webb County has no force under §2.

Indeed, any remedy that sought to reassemble old CD 23 would likely have the opposite effect of diminishing voting opportunities for Hispanics when compared to Plan 1374C. That is because, as the district court found, South and West Texas does not have a sufficient number of Hispanics to sustain seven effective districts. If old CD 23 were drawn again, it would take roughly 100,000 largely Hispanic voters from neighboring CD 28, weakening that as an Hispanic-opportunity district. In turn, reestablishing CD 28 might require taking so much population from CD 25 as to make it impossible to draw that district as an Hispanic-opportunity district at all.

### F. The Creation of an Additional Hispanic-Opportunity District, New Congressional District 25, Further Supports the District Court's Totality of the Circumstances Finding.

In addition to preserving a district that elects Congressman Henry Bonilla, Plan 1374C also created an *additional* Hispanic-opportunity district: new CD 25. This district, everyone agreed, is controlled by Hispanic voters in both primary and general elections. J.S., at 141a-42a, 146a-47a. Thus, from the perspective of the Hispanic voter, Plan 1374: (1) preserved the existing five districts that were performing as Hispanic-opportunity districts; (2) maintained CD 23 such that it will likely continue to elect the same person it has elected for more than a decade, Hispanic Republican Henry Bonilla (a representative who has a long demonstrated history of being responsive to the Hispanic community); and (3) created yet another Hispanic-opportunity district, new CD 25.

Appellants GI Forum's argument is that – in addition to creating the new Hispanic-opportunity district – CD 23 should not have been altered because, sometime in the future, it is possible that the demographics would have changed such that Congressman Bonilla would have been defeated by a candidate who enjoyed majority support from Hispanic voters (as compared to the substantial, but

less than majority, Hispanic support Bonilla has received). The district court correctly determined that the totality of the circumstances do not require such a result, J.S., at 135a-36a, and that finding is not clearly erroneous.

## IV. THE STATE'S POLITICAL CHOICE ABOUT HOW TO FULFILL ITS VOTING-RIGHTS-ACT OBLIGATIONS IN SOUTH AND WEST TEXAS DID NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

Appellants also challenge the Texas Legislature's creation of two districts in South and West Texas along its border with Mexico, new CD 25 and new CD 23, as violating the Fourteenth Amendment's Equal Protection Clause. *See* Jackson Br., at 43-49; GI Forum Br., at 27-34.[113] These challenges ultimately must fail because, as the district court correctly determined, Appellants failed to carry their significant burden in showing that race was the predominant factor in the Legislature's districting decisions. J.S., at 151a, 165a.

To the contrary, the Legislature's districting decisions concerning new CD 25 and new CD 23 were not predominantly motivated by racial considerations; they were driven instead by political considerations. That is, in reconfiguring old CD 23 and in creating new CD 25, the Legislature made two fundamental, interconnected political choices. First, in reconfiguring old CD 23, the Legislature was concerned primarily with incumbency protection and creating a more Republican-friendly district through the removal of reliable Democratic voters who also happened to be Hispanics. Second, because of old CD 23's

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[113] The Appellants' claims are somewhat at odds. The Jackson Appellants argue that new CD 25 is a racial gerrymander because of its shape and the desire of the Texas Legislature to make a different political choice about how best to comply with §5 of the Voting Rights Act. They claim that even that limited degree of race-consciousness violates the Constitution. The GI Forum Appellants, on the other hand, do not attack new CD 25; rather, they argue that §2 of the Voting Rights Act affirmatively obligated the State to create seven, rather than six, Hispanic-opportunity districts in South and West Texas.

reconfiguration, the Legislature faced another political choice – how best to avoid retrogression and achieve compliance with §5 of the Voting Rights Act. To solve this challenge, the Legislature chose to create a new Hispanic-opportunity district – new CD 25 – which would allow Hispanics to actually elect its candidate of choice, something which the data demonstrate old CD 23 had not done. The creation of new CD 25 and new CD 23 ultimately relates to what the Court has sanctioned as the "political choice" over "whether substantive or descriptive representation is preferable." *Ashcroft*, 539 U.S., at 483.

These facts, as found by the district court, entirely resolve the Appellants' equal protection claims. The Court should therefore affirm the district court's judgment upholding new CD 23 and New CD 25.

### A. Constitutional Standards and Standards of Review Governing Racial Gerrymander Claims.

Congressional redistricting is a matter primarily left to the States. *See, e.g., Easley v. Cromartie* (*Cromartie II*), 532 U.S. 234, 242 (2001) (stating that "districting decision[s] . . . ordinarily fall[] within a legislature's sphere of competence"). In accomplishing this task, States have the discretion to make the political choices subject only to constraints imposed by the Constitution and Congress. *See, e.g., Miller*, 515 U.S., at 915 ("Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests."); *id.*, at 915-16 ("[C]ourts . . . must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus."); *see also Cromartie II*, 532 U.S., at 242 (stating that "courts must 'exercise *extraordinary caution*'" in reviewing challenges to legislative districting plans).

Both the Equal Protection Clause of the Fourteenth Amendment and the Voting Rights Act restrict state legislatures in how they may consider race in making districting decisions. But they do not eliminate race as a consideration entirely; indeed, the Voting Rights Act – and

§5 in particular – requires some degree of race consciousness to comply with its legal mandate. As this Court has recognized, state legislatures may consider race in making districting decisions, provided that they do not subordinate traditional race-neutral districting principles and make race the *predominant* motivating factor in their districting decisions. *See Miller*, 515 U.S., at 916; *see also Ashcroft*, 539 U.S., at 480-83.

Here, the district court appropriately analyzed Appellants' claims of racial gerrymandering using the predominance test:

> "States are not required to ignore race; indeed the Supreme Court has acknowledged that states will always be aware of race when they draw district lines. The factor of race or ethnicity may be considered in the process as long as it does not predominate over traditional race-neutral redistricting principles. The fact that race is given consideration ... and the fact that majority-minority districts are intentionally created does not suffice to trigger strict scrutiny." J.S., at 161a (citing *Miller*, 515 U.S., at 916; *Shaw v. Reno*, 509 U.S. 630, 646 (1993) (*Shaw I*); *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (*Shaw II*); *Bush v. Vera*, 517 U.S. 952, 962 (1996)).

As an evidentiary matter, in challenging the Legislature's districting decisions in the court below, Appellants bore the "demanding" burden of proving that race was the Legislature's predominant consideration. *Id.*, at 241; *Miller*, 515 U.S., at 928 (O'Connor, J., concurring). They were not permitted merely to assert that race was "'*a* motivation'" for the districting decisions at issue. *Cromartie II*, 532 U.S., at 241 (quoting *Bush*, 517 U.S., at 959) (emphasis in original). Rather, Appellants were required to show that a facially neutral law was "unexplainable on grounds other than race." *Id.*, at 241-42 (internal quotations omitted) (quoting *Shaw I*, 509 U.S., at 644, in turn quoting *Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 266 (1977)). In finding that "[t]he districting decisions involved in Plan 1374C are best explained by

Texas's geography and population distribution and its Legislature's predominantly political intent," J.S., at 165a, the district court correctly determined that Appellants failed to carry their burden.

Because the District Court committed no clear error in its finding of fact that "[t]he record in this case does not show that ethnicity predominated," J.S., at 165a, and, accordingly, correctly rejected Appellants' Equal Protection claims regarding new CD 25 and new CD 23, the Court should affirm the district court's judgment.

### B. The District Court Did Not Commit Clear Error in Determining That Race Was Not the legislature's Predominant Motive in Creating New CD 25.

The Jackson Appellants challenge the Legislature's decision to create new CD 25 as an unconstitutional racial gerrymander. They purportedly base their attack on both circumstantial and direct evidence that race was the Legislature's predominant motive in creating the congressional district. *See* Jackson Br., at 44-49. Each will be discussed below.

#### 1. The district court correctly found that Appellants' circumstantial evidence does not demonstrate racial gerrymandering.

Appellants' circumstantial argument has two prongs. First, they claim that CD 25 has such a "bizarre" shape that this is proof of a predominant racial motive. Secondly, and closely related to their first argument, they point to the district's "smallest circle" score – a measure of compactness – as circumstantial evidence of a predominant racial motive. Jackson Br., at 43, 47 n.40, 48. Both of these arguments miss their mark.

##### a. District 25's shape is not "bizarre."

Appellants assert that, because CD 25 starts with the dense pocket of Hispanic population in McAllen on the Mexican border and runs from there "to the heavily Latino neighborhoods of Austin, in Central Texas, 300 miles

away," this creates a "bizarre" shape and indicates that the Legislature made a racially motivated choice. *Id.*, at 44 ("ethnicity is the only common thread"). They claim that CD 25's shape is "bizarre" for three principal reasons: its length, its relatively narrow shape, and the fact that "two dense pockets of Hispanic population" are 300 miles apart and connected by what they call a "rural 'land bridge.'" *Id.*, at 44-45. But Appellants' arguments ignore the district court's findings and the difficult realities of Texas geography and population distribution that affect legislative districting decisions.

As the district court found, the unique geography and population dispersion of South Texas present serious challenges to anyone attempting to make districting decisions for the area. J.S., at 154a. "The sheer size of the land, its irregular shape, and the distribution of the bulk of the population in various pockets of the State are the basics that shape the map before the redistricter even begins." J.S., at 115a. In South and West Texas especially, the "combination of geography and population distribution fixes certain characteristics of the redistricting map." J.S., at 116a. To ensure equipopulosity, "[t]he district that begins just east of El Paso County must be large and must run east from far West Texas, stretching deeply into central and South Texas. The districts that begin in far South Texas must run north in 'strip' fashion into central Texas. The district that begins in the southern tip of Texas and travels up the coast must proceed north." J.S., at 118a.

Regarding CD 25, it owes its shape directly to the geography and population dispersion of South and West Texas. Because population is concentrated heavily on the border, the only viable option is to draw the district from the border inland. And once a district moves inland, it must travel through many sparsely populated counties before reaching a more populous area where it can fill out its population. The tendency toward this shape, moreover, was even stronger here because the Legislature was working around other pre-existing districts with similar configurations. Districts 28 and 15, which previously had

been long and narrow, were split up the middle by new CD 25, which took roughly the same number of people from each of the prior districts. *See* J.S., at 218a. *Compare* J.A., at 295 (demonstrating that in Plan 1151C, CD 15 and CD 28 extend several hundred miles north from the Texas-Mexico border towards Central Texas), *with* J.A., at 296 (demonstrating that in Plan 1374C, CD 15, CD 25, and CD 28 extend, in similar fashion, north from the Texas-Mexico border towards Central Texas, and that these three districts also track the Gulf Coast of Texas). Thus, new CD 25's length is not surprising, and cannot demonstrate that racial motivations were predominant in its creation.

Moreover, what Appellants deride as "little more than a rural 'land bridge'" connecting two dense pockets of Hispanic population, Jackson Br., at 44, is, in fact, *seven whole, contiguous counties*. *See* J.A., at 296. The several intervening counties connecting Austin at the northernmost end of CD 25 and McAllen in the district's southernmost end are necessary because they are so sparsely populated. *See, e.g.*, J.A., at 298 (showing that South Texas consists of vast areas of sparse population). Appellants concede that any possible inference of racial gerrymandering based on a "long" district requires at least a showing that the "district reaches out . . . to grab a distant pocket of ethnic population, *without picking up substantial intervening Anglo population*." Jackson Br., at 46 (emphasis added). But, when District 25 reaches up from the Mexican border toward Austin, there is no "substantial intervening Anglo population" to avoid. The only split counties in CD 25 are located at the ends of the district, where the equal population requirement mandates such county splits. Therefore, the shape of CD 25, which is similar to the shapes of CD 28 and CD 15 in *both* Plan 1151C and Plan 1374C, does not raise constitutional concerns.[114]

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[114] According to Appellants, Justice Ginsburg's dissent in *Miller* "not[ed] that in Georgia's District 11, as here, the connecting links consisted of whole rural counties." Jackson Br., at 45. Presumably, Appellants are attempting to show that, because *Miller* struck down the district, the Court found it was not enough that the connecting portion

(Continued on following page)

By comparison, it is untenable for Appellants to describe CD 25's shape as "bizarre", as that term is understood in the context of districting litigation. It is nothing like the bizarre district at issue in *Shaw I*, which was variously described as resembling a "Rorschach ink-blot test" and a "bug spattered on a windshield." 509 U.S., at 635. Nor is it even remotely comparable to the bizarre "monstrosity" in *Miller*. *See* 515 U.S., at 909.

Indeed, as seems obligatory in racial-gerrymandering cases, *see, e.g., Potter v. Washington County, Fla.*, 653 F.Supp. 121, 130 (N.D. Fla. 1986) (describing one district as "dragon shaped"), Appellants have suggested a pejorative nickname for the district they challenge: a "bacon-strip" district. Jackson Br., at 45. But CD 25 has none of the bizarre twists and turns of a dragon; indeed,

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consisted of whole counties. But this mischaracterizes Justice Ginsburg's statement. She actually wrote, in supporting the constitutionality of the district: "Nor does the Eleventh District disrespect the boundaries of political subdivisions. Of the 22 counties in the district, 14 are intact and *8 are divided*." *Miller*, 515 U.S., at 941 (Ginsburg, J., dissenting) (emphasis added). Thus, even if Appellants' premise that a land bridge of contiguous counties was struck down in *Miller* were true, their suggestion that the district drawn by the Texas Legislature – in which 2 of 11 counties are divided – should be struck down *because* a district in which 8 of 14 districts were divided was struck down, should not be followed by the Court. But Appellants' premise is inaccurate. In *Miller*, the "land bridges" themselves – note that there were multiple "land bridges" in the district struck down by *Miller*, 515 U.S., at 908 – contained two *split* counties, *see id.*, at 928; *see also* Appellees' Br., at 7 n.7, *Miller v. Johnson* (No. 94-631), rather than undivided counties. Additionally, *Miller* points out that the challenged district included "*four*, discrete widely spaced urban centers," *Miller*, 515 U.S., at 908 (emphasis added), rather than the two in CD 25 drawn by the Texas Legislature. In all respects, the shape of CD 25 complies with traditional districting principles far better than the district struck down in *Miller*. Indeed, by force of geography CD 25 had to extend to more than one population center just to get sufficient population for a congressional district.

on some level, "bacon-strip" is merely colorful phrasing for "rectangle."[115]

The district court's finding that CD 25 did not have an unconstitutionally bizarre shape had substantial evidentiary support, was not clearly erroneous, and should therefore be affirmed.

**b. District 25's compactness scores reveal an absence of a predominant racial motive.**

Other than simply challenging CD 25's shape as being bizarre, Appellants also assert that compactness measures indicate that racial concerns predominated in the Legislature's drawing of CD 25. *See* Jackson Br., at 46-48. In considering compactness as a measure of bizarreness and as possible further circumstantial proof of predominant racial motive, the district court looked to the nonpartisan, bicameral Texas Legislative that CD 25 was not the result of a racial gerrymander, because these scores did not "approach those of districts so bizarrely and irregularly drawn that courts interpret their creation as 'an effort to segregate the races for purposes of voting, without regard for traditional districting principles.'" J.S., at 153a (citing *Shaw I*, 509 U.S., at 642; *Hunt v. Cromartie*, 526 U.S. 541, 548 n.3 (1999) (*Cromartie I*)).

These scores were derived from two different measures of compactness – "smallest-circle" and "perimeter-to-area." *Id.*, at 153a-55a. Appellants focus exclusively on the smallest-circle measure and fail to address the perimeter-to-area measure in their brief, which the

[115] The southern end of CD 25 is somewhat jagged, not because of the map-drawers, but because of geography: it follows the twists and turns of the Rio Grande River. Beyond that, the only irregularities are at the northern and southern tips, both necessary to achieve the precise population equality required by law. In between, the sides of the rectangle merely trace the longstanding historical boundaries of seven contiguous counties (which, necessarily, must be joined with some more populous areas to form a complete congressional district).

district court also considered and which provides strong evidence that race was not the predominant motive in the Legislature's districting decision.

The smallest-circle score for CD 25 in Plan 1374C is 8.5. *Id.*, at 153a. Appellants suggest that this score is sufficient to subject the district to strict scrutiny and to demonstrate race as the predominant legislative motive. Jackson Br., at 46-48, 47 n.40 (stating that CD 25 has a worse smallest circle score than any of the 32 districts in Plan 1151C).[116] Although this score is moderately high, it still is less than half the 21.7 score achieved by North Carolina's District 12, which was struck down in *Shaw II*. And CD 25's smallest-circle score is below the score (8.6) that the reconfigured North Carolina district achieved, which the Court deemed to be constitutional. *See Cromartie v. Hunt*, 133 F.Supp.2d 407, 415 (E.D.N.C. 2000), *rev'd*, *Easley v. Cromartie*, 532 U.S. 234 (2001).

Moreover, as the district court correctly observed, "the issue is whether a district's shape, as measured by compactness scores, provides evidence of a constitutional violation *when considered in relation to the geography and population distribution in the relevant part of the State.*" J.S., at 153a (emphasis added) (citing *Miller*, 515 U.S., at 917). As already discussed above, geography and population distribution played a decisive role in shaping CD 25's configuration. Accordingly, the district court correctly found that "[t]he smallest circle measure of compactness for the southern and western districts in Plan 1374C, examined in relation to the geography and population, reflect the sheer size and population distribution of the area, rather than a calculated stretch to find voters of a particular ethnic makeup." J.S., at 154a-55a.

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[116] Despite Appellants' assertion, just because a particular district has a higher score than other districts in the map, this fact, by itself, does not mean that the district is unconstitutional. Every districting map, regardless of the considerations that went into the districting decisions, will have one district with the lowest scores; that fact does not render the district unconstitutional.

Appellants further assert that "[w]hen a mapmaker drawing a minority district reaches out a long distance to grab a distant pocket of ethnic population, *without picking up substantial intervening Anglo population, the district's 'Smallest Circle' score suffers.*" Jackson Br., at 46 (emphasis added). But, as the district court pointed out, "population densities in Congressional Districts 28, 25, and 15, *both Anglo and Hispanic*, are highest in the Valley and in Central Texas, separated by relatively sparsely populated areas." J.S., at 154a (emphasis added). And there was no intervening Anglo population to exclude. Thus, it was not an attempt to exclude one racial group, nor an attempt to include another racial group, that led to CD 25's length and smallest-circle score – it was the lack of sufficient population in the counties between the border and Central Texas.

In addition to the smallest-circle measure of compactness, the district court also considered CD 25's perimeter-to-area score as a further measure of compactness. As the district court noted, "[p]erimeter to area calculations are useful for determining whether map drawers used convoluted lines to bring members of one racial group into a district while excluding other members of another racial group." J.S., at 155a; *see also* Tr., 12/19/03 AM, at 7:24-25 to 8:1-2 (Testimony of Todd Giberson) ("[A] perimeter-to-area ratio . . . measures basically how convoluted a given boundary is that surrounds a given area, how convolute[d] that area is."); *id.*, at 35:1-4 (agreeing that "[r]oughly speaking, the perimeter-to-area measure looks at how jagged or irregular or convoluted the District's boundary is"). Indeed, perimeter-to-area is probably a more useful measure of compactness than is the smallest-circle measure because it is "a better measure of what the Court doesn't like," that is, "[t]he perimeter score . . . shows how convoluted [and] picked apart the boundaries are on race or ethnicity." *Id.*, at 76:22-25 to 77:1-4, 13-16, 21-24.

Here, the district's perimeter-to-area score is safely within normal limits, coming in at 9.6. J.S., at 153a. Appellants do not dispute that, for purposes of discerning racial motives, a 9.6 perimeter-to-area score is unremarkable. In fact, their own expert testified that, by itself, this

number would not be problematic. Tr., 12/15/03 AM, at 80:11-14 (Appellants' expert stating "it's not unusual to see [a perimeter-to-area score] up *in the hundreds*" (emphasis added)). By contrast, Texas's then-Districts 18, 29, and 30 which were struck down in *Bush v. Vera*, 517 U.S. 952 (1996), had perimeter-to-area scores of 106.3, 144.0, and 69.0, respectively. *See* Tr. 12/19 AM 12:14-25 & 13:1-25.

Based on the testimony, the district court accurately found that CD 25's perimeter-to-area score did "not reflect the predominance of ethnicity in drawing district lines," and did "not reveal lines precisely drawn to include Hispanics and exclude Anglo voters, to ensure Hispanic citizen voting age majority districts." J.S., at 155a. Rather, the court found that the score reflected "lines drawn to include enough voters to meet the one-man-one-vote constitutional requirement." *Id.* This conclusion was not clearly erroneous.

**2. The district court correctly found that Appellants' purported direct evidence did not support a finding of racial gerrymandering.**

Appellants further assert that two bits of direct testimony supports their racial gerrymandering claim. Jackson Br., at 48. They claim that direct testimony from two of the State's witnesses, Representative Phil King and expert Todd Giberson, established "that the intent in creating new District 25 was racial, not political." *Id.* This assertion is false.

For starters, Appellants take Representative King's testimony out of context. *Id.* (citing Tr., 12/18/03 PM, at 152-42). In fact, the Representative's testimony directly supports the district court's finding that politics, not race, was the Legislature's predominant motive in drawing CD 25. Representative King flatly stated that the Legislature's "objective was always how do we get more Republican seats and stay away from Districts that would create issues for DOJ." Tr., 12/18/03 PM, at 152:21-24. The principal motivating force behind creating CD 25, according to Representative King, was the Legislature's twin

aims of protecting the Republican incumbent in CD 23, Congressman Bonilla, and avoiding retrogression under §5 by creating CD 25 as an Hispanic-majority district. *Id.*, at 151:2-25 to 152:1-11. Moreover, the configuration of CD 25 also took into account how to make a Republican district out of CD 10. *Id.*, at 152:13-18. To accomplish this goal, Democrats were moved out of CD 10 and into CD 25. *Id.* This is obviously a political objective.

Contrary to Appellants' assertions, this testimony fully supports the district court's finding that Representative King "provided credible testimony that the numerous decisions embodied in the location of each district line [in South and West Texas] combined the broad political goal of increasing Republican seats with local political decisions that are the most traditional of districting criteria." J.S., at 160a-61a. That finding was not clearly erroneous.

In addition to the testimony of Representative King, Appellants point to the testimony of the State's geographic expert, Todd Giberson, as evidence of the Legislature's predominant racial motive in creating CD 25. Jackson Br., at 48. Giberson is a "redistricting analyst and a . . . geographic information systems programmer for the [Texas] Attorney General's office." Tr., 12/19/03 AM, at 6:10-12. Appellants assert that Giberson's testimony reveals that, in creating CD 25, it was "more important" for the Legislature "to create an Hispanic district than a Democratic district." Jackson Br., at 48 (citing Tr., 12/19/03 AM, at 47).[117] Giberson did indeed make that statement. But, again, as with Representative King's testimony, context is key, and Appellants fail to provide it.

As a geographer, Giberson testified concerning compactness scores and their relative distribution compared to those of other districts. His subjective opinion – "I *believe* that the . . . that they were trying to create an

[117] Appellants incorrectly reference page 47 from the transcript. The correct page reference for the Giberson quote is page 52.

Hispanic District," Tr., 12/19/03 AM, at 54:4-5 (emphasis added) – provided no basis for assessing the *Legislature's* intent. Indeed, a few questions later in his testimony, Giberson was asked:

> "Q. So the map-makers were trying to create a new Hispanic District because they wanted the plan as a whole to have one additional Hispanic District and one fewer non-Hispanic Districts?" *Id.*, at 54:17-20.

This question drew an objection:

> I think now, Your Honor, we're way outside the bounds of direct. He looked at compactness scores. He's not a member of the Legislature, and I object on relevancy and also on the hearsay. *Id.*, at 54:21-25.

The district court agreed and sustained the objection. *Id.*, at 54:12-13.

Thus, the district court gave Giberson's subjective testimony about legislative intent no weight, which was entirely appropriate.

**3. There was ample evidentiary support for the district court's finding that politics, not race, was the legislature's predominant motivation.**

The district court gave Appellants' racial-gerrymandering challenge to new CD 25 full consideration. After hearing all the evidence and assessing the witnesses' credibility, the court concluded that "[t]he evidence show[ed] that the [district] lines did not make twists, turns, or jumps that can only be explained as efforts to include Hispanics or exclude Anglos, or vice-versa." J.S., at 162a. Instead, the court found plentiful evidence that "many of the lines were drawn for such reasons as balancing population, keeping certain cities or areas intact in a district, and satisfying requests from state or federal legislators to keep certain areas together, or place universities in different districts." J.S., at 162a. Ultimately, the District Court concluded that Appellants did not meet "their significant burden of demonstrating racial gerrymandering." J.S., at 165a. Because the trial

court's findings with respect to the constitutionality of CD 25 are not clearly erroneous, the Court should affirm.

### C. The District Court Correctly Found That District 23 Was Created as a Result of Politically Motivated Decisions.

The GI Forum Appellants assert that the Legislature's creation of new CD 23 violated the Equal Protection Clause of the Fourteenth Amendment. *See* GI Forum Br., at 27-34. They argue that the Legislature exhibited unconstitutional discriminatory intent in drawing CD 23 because it intentionally diluted Hispanic voting strength. The test for unconstitutional vote dilution, they claim, is the same as the test for intentional vote dilution under §2 of the Voting Rights Act; therefore, they claim that the §2 test may be used here to demonstrate an equal protection violation. *See id.*, at 28.

But GI Forum's argument is founded upon an incorrect view of §2. Proper §2 analysis focuses on results, not intent.[118] The district court, however, did not follow GI Forum's view and, instead, analyzed their claim using the appropriate §2 standard, finding that the Legislature's actions in drawing CD 23 comported with all the dictates of §2.

Appellants erroneously base their claims of unconstitutional intent on *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). *See* GI Forum Br., at 29. But, even under *Arlington Heights*, plaintiffs must prove that an "invidious discriminatory purpose was a motivating factor," 429 U.S., at 266; mere

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[118] The Court has held that, after the 1982 amendments, §2 "focuses exclusively on the consequences of apportionment. Only if the apportionment scheme has the *effect* of denying a protected class the equal opportunity to elect its candidate of choice does it violate §2; where such an effect has not been demonstrated, §2 *simply does not speak to the matter.*" *Voinovich v. Quilter*, 507 U.S. 146, 155 (1993) (emphasis added). *Accord* S. Rep. No. 97-417, at 36 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 214 (stating that a §2 inquiry into intent "asks the wrong question").

awareness of race does not suffice. *Washington v. Davis*, 426 U.S. 229, 240-42 (1976); *see also Personnel Adm'r v. Feeney*, 442 U.S. 256, 279 (1979) (stating that "'[d]iscriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part *'because of,' not merely 'in spite of,'* its adverse effects upon an identifiable group." (emphasis added)) (citation omitted). As the district court noted, "the Supreme Court has acknowledged that states will always be aware of race when they draw district lines." J.S., at 151a (citing *Miller*, 515 U.S., at 916).

In *Arlington Heights*, the Court held that the plaintiffs there did not meet the standard of proving invidious intent rather than mere awareness. 429 U.S., at 270-71. Likewise, the district court here found that there had been no racial discrimination in the drawing of District 23:

> "[C]redible testimony from the State's witnesses demonstrated that factors at the heart of traditional districting criteria, including political goals, predominately influenced the numerous decisions embodied in the location of each district line." J.S., at 158a.

Appellants' argument as to the State's contrary intent, relies upon the testimony of a non-defendant who indicated – at most – consciousness of race on the part of map drawers. *See* GI Forum Br., at 30-31. But, as in *Arlington Heights*, 429 U.S., at 269-70, the district court here found that there was "credible testimony that the numerous decisions embodied in the location of each district line combined the broad political goal of increasing Republican seats with local political decisions that are the most traditional of districting criteria." J.S., at 160a-61a. That finding was adequately supported by sufficient evidence and is not clearly erroneous.

Nor could Appellants prevail under the modern constitutional standard, which the district court properly applied in assessing intent. *See* J.S., at 150a-51a (citing *Cromartie*

*II*, 532 U.S. 234; *Bush v. Vera*, 517 U.S. 952; *Shaw II*, 517 U.S. 899; *Miller v. Johnson*, 515 U.S. 900; *Shaw I*, 509 U.S. 630). The district court's analysis properly placed the burden of proof on the plaintiffs. *See* J.S., at 151a (citing *Vera*, 517 U.S., at 958-59; *Miller*, 515 U.S., at 916).

On the full record, the district court properly found that CD 23's new lines were most logically and credibly explained as a political division:

> "The State presented undisputed evidence that the Legislature changed the lines of Congressional District 23 to meet the political purpose of making the district more Republican and protecting the incumbent, Congressman Bonilla. Plaintiffs agree that the primary purpose of this change was political and concede that there is a strong correlation between Hispanic and Democratic voters." J.S., at 156a.[119]

The district court also properly rejected the conclusions offered by Appellants' experts because they failed to account for the effect of politics. *See* J.S., at 156a n.201. The Court's equal protection jurisprudence recognizes that sometimes race and party are strongly correlated, and that politically motivated district lines do not in themselves implicate racial intent under the Constitution. "[A] jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be Black Democrats and even if the State were

[119] Appellants refer to a comments by two state legislators to suggest that there was a "profoundly racial motive". to "reduce the Latino population of Congressional District 23 so that it could not elect the Latino-preferred candidate, but ensure that the district was nominally Latino so that Mr. Bonilla could still claim to be elected from a Latino-majority district." GI Forum Br., at 11, 10-12. But the District Court weighed all the evidence and explained the Legislature's "dual goals" with respect to District 23: "increasing Republican seats in general," and "protecting Bonilla's incumbency in particular." J.S., at 135a. Both goals were political, rather than racial. Given the demographics of South and West Texas, there was, at most, awareness of race.

conscious of that fact." *Cromartie I*, 526 U.S., at 551-52. *Cromartie I* controls Appellants' constitutional claims.

Here, the district court expressly found that politics, not race, drove the line-drawing. The decision to split Webb County "affected voters whose ethnicity and political partisanship voting achieved strong correlation." J.S., at 156a. The district court rejected any inference that this county split had any predominant racial motivation: "[T]he State provided credible race-neutral explanations for Plan 1374C's county cuts. . . . The legislative motivation for the division of Webb County . . . was political." *Id.*, at 158a. As the district court found, the cuts through Webb County "in part used the interstate highway as a district boundary, deviating where necessary to achieve population balance." *Id.*, at 159a. They were not based on race.

Nor is there any viable comparison between this case and *Bush v. Vera*, where the State used block-level data more than necessary, from which the Court inferred that information available at that level (population and race) was more significant than information not broken down at such a fine level of geography (election precinct results). *See* 517 U.S., at 961-62. Here, "the data the Legislature used in the districting process does not support a claim of unwarranted reliance on ethnicity to make the line-drawing decisions." J.S., at 164a. Unlike *Vera*, "the State presented undisputed testimony that the map drawers examined race at the block level in South and West Texas region on only a few occasions in order to avoid splitting minority communities." J.S., at 164a-65a.

The District Court was able to evaluate the short testimonial snippets relied upon by Appellants in their full context, concluding that

> "[t]he record does not present evidence of statements by legislators or staff supporting the claim that ethnicity predominated in the redistricting process. To the contrary, the emails, statements, and other communications from those involved in the process reveal that politics predominated." J.S., at 64a.

On the whole, the District Court found credible the State's explanation of "the numerous decisions embodied in the location of each district line" as reflecting "local political decisions that are the most traditional of districting criteria." J.S., at 158a. Because this finding is supported by the record, the district court committed no clear error.

## V. Even if the Court Were to Find Some Legal Infirmity, Reinstating Plan 1151C Would Not Be an Appropriate Remedy.

Unless the Court were to rule that a State may *never* replace a court-drawn districting plan with a plan of its own, a reversal of any part of the district court's judgment should at most include a remand. Consistent with the limited, remedial role of federal courts, the State of Texas should be afforded a full opportunity to remedy any deficiency the Court might find in Plan 1374C and to implement the State's policy preferences consistent with the Court's opinion. *Cf. Upham*, 456 U.S., at 44 ("[T]he District Court's plan is only an interim plan and is subject to replacement by the legislature.").

Three Appellants urge that Plan 1374C be set aside in its entirety, and that Plan 1151C be reinstated. *See* Jackson Br., at 50 (requesting a remand for the district court to "immediately reinstate congressional redistricting Plan 1151C"); Travis County Br., at 30 (requesting the Court "order reinstatement of Plan 1151C"); LULAC Br., at 37 (requesting the Court to "enjoin any further use of [Plan 1374C]"). The fourth Appellant, GI Forum, wishing to preserve the new Hispanic-opportunity district created by the Legislature, does not urge reinstatement of Plan 1151C; remand to draw yet one more Hispanic-opportunity district. GI Forum Br., at 50.

On the law and the facts, the Court should affirm the judgment of the district court, but, if it were to reverse any aspect of the judgment, in no event would Plan 1151C – the core policy preferences of which have been squarely rejected by the Texas Legislature – be an appropriate remedy. *Upham*, 456 U.S., at 43 ("[T]he District Court was

not free . . . to disregard the political program of the Texas State Legislature.").

## CONCLUSION

The Court should affirm the judgment of the district court.

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IN THE

# Supreme Court of the United States

EDDIE JACKSON, *et al.*,
*Appellants*,
v.
RICK PERRY, *et al.*,
*Appellees*

**On Appeal from the United States District Court for the Eastern District of Texas**

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*Thornburg v. Gingles*, 478 U.S. 30 (1986) ..... *passim*

*Voinovich v. Quilter*, 507 U.S. 146 (1993) ..... 8, 15, 19

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42 U.S.C. 1973 ..... *passim*

42 U.S.C. 1973c ..... *passim*

28 C.F.R. 51.49 ..... 9

*Revision of Procedure for the Administration of Section 5 of the Voting Rights Act of 1965*,
52 Fed. Reg. 486 (Jan. 6, 1987). ..... 10

## REPLY BRIEF OF THE TEXAS STATE-AREA CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE

Our opening brief showed the district court erred (1) by viewing Plaintiffs' Section 2 grievance, seeking a remedy from the deliberate dispersal of Tarrant County's black community "into districts in which they constitute an ineffective minority," *Thornburgh v. Gingles*, 478 U.S. 30, 46 n.11 (1986), through the distorted lens of the "50% rule" and (2) by ignoring the context in which this occurred, *i.e.*, as part of a measure that drastically reduced minority voting strength statewide and reversed progress toward the "'interracial democracy,'" see *Georgia v. Ashcroft*, 539 U.S. 461 (2003), that the Texas NAACP and others – of all races and political affiliations – have labored to achieve.

The various Appellees assert that the Court may uphold that ruling, sometimes trying to show that the "50% rule" is correct and elsewhere claiming that the court made other "factual findings" that, if reviewed deferentially, could support affirmance. Both assertions are wrong: the 50% rule is indefensible as a matter of principle and precedent, and because the "clearly erroneous" standard does not insulate findings predicated on *legal* errors, the statements to which Appellees point would not, if they *were* findings, allow affirmance.

Rather than confine themselves to the conventional (albeit untenable) argument that the decision was not clearly erroneous, Appellees also ask the Court to accept that the plan "*expanded* minority opportunity" under the Voting Rights Act, State Br. 18 (emphasis added), and to drape what a *sympathetic* observer would describe as an act of raw partisan aggrandizement in the mantle of *Georgia v. Ashcroft* and the Civil Rights Movement. But no one who participated in these still-recent events (defendants least of all) could take such claims seriously – and Appellees' misguided and fundamentally counterfactual efforts do not make for easy reading.

## I. The 2003 Plan Did Not "Expand Minority Opportunity" and It Is Nothing Like The One Considered in *Georgia v. Ashcroft*

Appellees do not attempt to back their claim of "expanded opportunity" with an explanation why every African-American legislator except one – who was voted out of office in the next election – voted against the plan;[1] why 89% of the 2,620 individuals attending public hearings spoke against it, see Ft. Worth NAACP *Amicus* Br. 3; why it met unanimous opposition from the State's minority civil rights groups, who urged the Justice Department to interpose an objection – or why civil servants in the Justice Department were equally unable to perceive its supposedly salutary effect.

The reasons for this reaction, set out in our opening brief, are hard to obscure. By every objective measure, the plan drastically reduced electoral opportunity for African-American and Latino voters, replacing an arrangement where minority voters elected or substantially influenced the election of 17 of 32 members of Texas's congressional delegation with one that divides the State into 10 "minority" districts and 22 Anglo districts; where African-American votes will be effectively irrelevant in almost all congressional elections and residents of the State's third-largest black community, previously able to elect their representative, were splintered into five districts, where they have no electoral influence at all.[2]

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[1]That legislator, as an *amicus*, asserts that "[t]he Texas Democratic Party, angered by his support for the Republican-backed congressional map, successfully worked to remove [him]," Ron Wilson *Amicus* Br.5 n.4. But it was the legislator's *constituents* who turned him out of office, in a primary contest where his support for the plan was the central issue, notwithstanding his otherwise strong legislative record on issues of concern to the African-American community.

[2]The Benkiser Appellees startlingly assert, Br. 29 n.24, that "there is no suggestion here * * * 'that candidates elected without decisive minority support would be willing to take the minority's interest into account.'" (quoting *Ashcroft*, 539 U.S. at 482). But as we showed, the Representatives of the districts to which these black voters were reassigned consistently

Moreover, direct evidence showed that, to the extent they considered "minority opportunity under the Voting Rights Act," defendants treated the law as an obstacle to be circumvented – and that they opted for an alternative they themselves ranked as offering minority voters the least. It further showed, that the "plans" presented to the public with great solemnity were a diversion – with the real plan, drawn and vetted in Washington, kept from Texas's citizenry until the last possible moment.

The substantiation Appellees do muster for their claim – a statement that "[s]ome legislators referred to the new map as an '8-3' map, replacing the prior '7-2' map," (supposedly) because "it went from seven majority-Hispanic voting-age population (VAP) districts to eight" and "from two African-American opportunity districts * * * to three," State Br. 12 – only attests to the difficulty of obscuring the plan's true character.

A "legislator" who thus described the plan would be straining the outer limits of statistical ingenuity. Not only does the "8" rely on a population measure, VAP, that the *State* (citing Fifth Circuit precedent) has consistently claimed has no place in Voting Rights Act analysis, but it counts a district that the decision below, *in a finding the State expressly endorses*, said "is not an Hispanic-opportunity district." See Br. 15 (citing J.S.App. 134a).

Nor does the State endeavor to explain why these "legislators" would resort to an entirely *different* metric – "opportunity districts" – to describe *African-American* electoral strength. While this shift in focus enables the State to avoid the "inexorable zero," *Teamsters v. United States*, 431 U.S. 324, 342 n.23 (1977) – *the plan has no district with a "majority-[black] voting-age population*" – doing so carries a heavy price in a brief that elsewhere tries to persuade the Court that, as a matter of plain statutory meaning, African-American voters do not, and cannot, elect candidates of choice unless they

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received scores of "F" on the NAACP's Legislative Scorecard.

constitute 50% or more of district population. See *infra*.[3]

Appellees' assertions that the 2003 Texas plan is just "like the [one enacted by the] Georgia Legislature in *Ashcroft*," Benkiser Br. 47; see State Br. 92, entail a bold misreading of precedent and a seemingly determined effort to foster misunderstanding of what the Texas plan actually involved.

From a minority voting rights perspective, the Texas and Georgia plans are no more alike than the two prominent public officials with whom they are associated – U.S. Representatives John Lewis and Tom DeLay. The Georgia plan was intended to, and did, expand the number of districts in which African American voters could wield power, "increas[ing] the number of [state senate] districts with a majority black voting age population by three, and * * * the number of districts with a black voting age population of between 30% and 50% by another five." 539 U.S. at 471. Representative Lewis and other African-American leaders testified that Georgia's plan would "give real meaning to voting for African Americans' [by giving them] 'a greater chance of putting in office people [who would be] responsive.'" *Id.* at 489; 195 F. Supp. 2d at 106 (Oberdorfer, J., dissenting).

The processes by which the Georgia and Texas plans were created could not have been more different either. The Georgia redistricting was conducted under ordinary legislative rules, and the State's "African-American legislators were key figures in crafting [it]," 195 F. Supp. 2d at 104 (Oberdorfer, J.). An African-American state senator had chaired the subcommittee responsible for drafting the plan, *id.*, and 43 of the 45 black members of the legislature voted in favor. 539 U.S. at 471. Compare Ft. Worth NAACP Br. 3-4 (describing intensity of opposition to Texas plan within the African-American

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[3]The State's claim is in fact contradicted by the Benkiser Appellees' recognition (albeit as part of a spurious "proportionality" demonstration) that the plan dramatically *reduces* minority voting strength. See Br. 43.

community).[4]

The lone basis Appellees cite for their claim to have embraced a model of "effective minority representation" is the (post-trial) evidence of success of an African-American congressional candidate in District 9. See State Br. 82 (noting 2004 election results in "new District 9, which had a markedly greater African-American voting-age population (36.5%)" in which "incumbent Anglo Democrat Chris Bell * * * was roundly defeated by an African-American Democrat, now-Congressman Al Green, 66.5% to 31.3%"). From this fact, Appellees spin out an argument that, as in Georgia, changing *District 24* was part of an effort to enhance black electoral strength and accuse Plaintiffs of seeking to "repack" District 24 – and thereby prevent the State from augmenting black voting strength. See State Br. 93 (accusing Plaintiffs of opposing the "dismantling [District 24] * * * to expand minority opportunity in majority-minority districts").

First, whatever other relevance it might have to this case, see *infra*, the inescapable import of this (non-record) evidence is this: if a district that has an African-American VAP of 36.5% can be described as a "safe" seat, Wilson Br. 6 – or one in which African-American voters can "predictably" elect a "*black*-supported black candidate," Benkiser Br. 47, and defeat an incumbent Anglo Democrat by a *35% margin* in the party primary, then the supposed "50% rule" has been refuted.[5]

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[4] The State's boast (Br. 11) that the plan honored "*a number* of [minority legislators'] requests," must be placed in perspective. The State points to the fact that, at his request, Representative Lewis's district was kept whole – "in CD26." But Rep. Lewis voted *against* the plan – and he had asked that his district be put whole in Martin Frost's district. J.S.App. 87a n.62. That his constituents are now together in a district carefully chosen to minimize their chance of affecting the vote – is hardly overpowering evidence of solicitude for minority voters or their representatives.

[5] As we explain below, these were no slips of the pen. Appellees' legal position *requires them* to have things both ways. Like the district court, Appellees simultaneously insist that there is some essential difference between districts where a minority group is a numerical "majority" and those

But the insinuation that voting strength in Fort Worth was diminished *in order to* "afford more electoral opportunity" in Houston, State Br. 92, assumes that the Court lacks access to a map of Texas. New District 9 is hundreds of miles away from District 24, and not a single Fort Worth voter is part of the new Houston-based district. Indeed, the NAACP placed before the district court a Plan, 1251C, which both strengthened the Houston district and increased the percentage of minority voters in District 24.[6]

Plaintiffs obviously did not ask the court to "re-pack[] voters into old CD24" (State Br. 95). See *Johnson v. De Grandy*, 512 U.S. 997, 1007 (1994) (describing "packing" as concentrating voters in order to "minimize their influence in the districts next door"); *Gingles*, 478 U.S. at 46 n.11 ("the concentration of blacks into districts where they constitute an excessive majority"). Unlike in Georgia, where incumbent African-American legislators accepted less "safe" districts, so some of their minority constituents could cast votes in *adjoining districts*, where they would elect candidates responsive to minority interests, see 195 F. Supp. 2d at 92, the evidence is undeniable that black residents of Tarrant County were not dispersed *so they could have greater representation*. They were shunted to districts carefully chosen to assure that their votes would have *no* effect. District 24 has been "unpacked" only in the sense one could say that a child who takes a hammer to a ceramic piggy bank "unpacks" it.

Nor, of course, did the Texas NAACP ever argue that "old CD25 could not be altered because * * * it effectively

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where it accounts for less than 50% of CVAP, while relying on districts that fail that test to support their claims of racial fairness. See also State Br. 82 (quoting court's description of Congresswoman Johnson as "holding a seat in an adjacent *largely Black* district," J.S.App. 107a) (emphasis added); J.A. 184-86 (State's expert describing three districts with less than 50% black CVAP as "controlled" by African American voters).

[6]Indeed, *Amicus* Wilson voted in favor of this Plan when it was introduced in the regular legislative session.

functioned as an African-American opportunity district." State Br. 81. Far from questioning the power of the State to re-draw the district to give black voters *greater* power, we and other minority groups demonstrated that – whatever might be said about the electoral behavior of the district drawn by the court – strengthening the electoral power of Houston's black voters in no way depended on destroying District 24. See *Shaw v. Hunt*, 517 U.S. 899, 917 (1996).[7]

## II. The District Court Clearly Erred in Denying The Voting Rights Act Claim

Appellees' primary defense of the Voting Rights Act decision is to highlight that there was a trial below and repeat that *Gingles*' held that the "clearly erroneous" standard governs review of the ultimate vote dilution finding, as well as subsidiary findings of fact. See State Br. 70-71, 80, 84, 86, 88, 90. But the district court's brusque handling of the Section 2 challenge to the dismantling of CD24 surely did not involve the kind of "searching * * * evaluation," 478 U.S. at 65, that *Gingles* contemplates – the list of considerations that the Court (and the 97th Congress) identified as central to the ultimate question of liability, *id.* at 44, are not even *mentioned* in the decision below – and the bulk of the judicial statements on which Appellees' deference arguments hinge are more fairly described as comments than "findings of fact." See *infra*, pp. 16-20; Fed. R. Civ. P. 52(a) ("the court shall find the facts specially and state separately its conclusions of law thereon").

But there is a bigger problem with Appellees' reliance on the standard of review. It is blackletter law that a factual

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[7] The assertion that the new map "enhances" minority political influence would take the prize for implausibility were it not for the claim by the Chair of the Texas Republican Party that "Appellants' theory * * * produces results that may actually *harm minorities' quest for equal electoral opportunity*." Benkiser Br. 43 (emphasis added). But there is no need to refute this claim here – because that task is accomplished in the very *next sentence* of the same Brief, wherein Appellees purport to show that the former plan afforded minorities *too much* representation.

finding *is* clearly erroneous when it is "predicated on a misunderstanding of the governing rule of law.'" *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 501 (1984); see also *Koon v. United States*, 518 U.S. 81, 100 (1996) (a "court by definition abuses its discretion when it makes an error of law"). In fact, that principle was expressly invoked in *Gingles*, where the Court reversed certain of the district court's vote dilution findings. See 478 U.S. at 79 (emphasizing that the "clearly erroneous" standard "'does not inhibit an appellate court's power,'" to overturn factual findings infected by legal error) (quoting *Bose*, 466 U.S. at 501).[8] Both the ultimate finding and the "findings" to which Appellees direct the Court's attention are infected with legal error.

### A. Appellees Fundamentally Misconceive The Relationship Between Sections 2 and 5

As our opening brief explained (Br. 48-50), the district court's whole consideration of Plaintiffs' challenge to the dismantling of District 24 was premised on a serious error: *i.e.*, "that alterations to [CD24] raised questions primarily of *§ 5*, which have been answered by the Department of Justice," J.S.App. 113a (emphasis added), when neither the availability of administrative review nor the "answer" it yields is supposed to have relevance in the Section 2 analysis.

Appellees likewise invoke Section 5, insisting that allowing plaintiffs to establish "potential to elect," see *Gingles*, 478 U.S. at 50, through evidence of actual behavior, rather than only by district demographics, would conflict with *Georgia v. Ashcroft*'s construction of that provision:

If Appellants' reading of §2 is to be believed, Georgia

[8] This Court's post-*Gingles* cases show no special reluctance to apply this principle in the voting rights context. See, *e.g.*, *De Grandy*, 512 U.S. at 1022; *Voinovich v. Quilter*, 507 U.S. 146, 154-58 (1993); cf. *Easley v. Cromartie* 532 U.S. 234, 242 (2001) (emphasizing that Court's ususal reluctance to overturn "the concurrent findings of * * * two lower courts" does not apply when "there is no intermediate court, and we are the only court of review") (citation omitted).